IN THE

COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

TRIAL DIVISION – CRIMINAL SECTION

IN RE: COUNTY INVESTIGATING GRAND JURY OF MAY 15, 1986	86-007363

REPORT OF THE GRAND JURY

RONALD D. CASTILLE
District Attorney

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
TRIAL DIVISION -- CRIMINAL SECTION

IN RE:	:	86-007363
COUNTY INVESTIGATING GRAND	:	
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FINDINGS AND ORDER

AND NOW, this 20th day of April, 1988, after having examined the Report and Record of the County Investigating Grand Jury of May 15, 1986, this Court finds that the said Report is within the authority of the Investigating Grand Jury and is otherwise in accordance with the provisions of the Grand Jury Act. In view of this finding, the Court hereby accepts the Report and refers it to the Clerk of Court for filing as a public record.

Charles L. Durham

Honorable Charles L. Durham

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
TRIAL DIVISION -- CRIMINAL SECTION

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REPORT

TO THE HONORABLE CHARLES L. DURHAM, SUPERVISING JUDGE:

WE, the County Investigating Grand Jury of May 15, 1986, having been charged by the Court to investigate the events of May 13, 1985 and subsequently, arising from and related to the service of warrants at 6221 Osage Avenue, and having obtained knowledge of such matters from witnesses sworn by the Court and testifying before us, upon our respective oaths, not fewer than twelve (12) concurring, do hereby submit this Report to the Court.

Foreperson

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
TRIAL DIVISION -- CRIMINAL SECTION

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I. INTRODUCTION

On May 13, 1985, the Philadelphia Police Department, at the direction of Mayor W. Wilson Goode, attempted to serve a search warrant and various arrest warrants at 6221 Osage Avenue, the headquarters of an organization called "MOVE." An urban disaster of scarcely imaginable proportions resulted.

The immediate toll of the May 13th assault was unprecedented: eleven people died, an entire neighborhood lay in ruins, and two hundred and fifty people were left homeless. This debacle's more far-reaching costs and effects will probably never be accurately assessed. The suffering and human misery incurred by the participants and the displaced alike are incalculable. Some officers involved in the confrontation have left the Philadelphia police force because of psychiatric disabilities caused by the incident. Others, including the displaced victims, have been psychologically scarred. Many people will be affected by this incident for the rest of their lives.

The tangible costs to the Philadelphia taxpayers are somewhat more quantifiable and eventually may be tabulated. Undoubtedly, the total cost will be staggering.

A separate grand jury investigation, for example, has already considered the Osage Avenue rebuilding effort and noted in its 1987 report that more than $9 million had already been spent although the project's total cost should have been about $6.5 million.

On February 19, 1988, it was reported that, according to City records as of that date, the projected cost of the MOVE confrontation had risen to $19.2 million. This figure included rebuilding costs, relocation costs, and the City funds expended to provide private legal representation for Mayor W. Wilson Goode and other administration officials involved in the incident, as well as the money spent to finance the investigation ordered by Goode and conducted by the Philadelphia Special Investigating Commission (better known as the MOVE Commission). The $19.2 million, however, did not include either the expense of the prior grand jury investigation into the Osage Avenue rebuilding efforts or the expense of this grand jury investigation which was convened only after the completion of the MOVE Commission's work. Apparently, it also did not include any estimate as to the ultimate price tag for the many civil suits now pending against the City of Philadelphia and its officials. Their final resolution may well prove extremely costly to the City and its citizenry.

Using the statutory procedures which are available only to investigating grand juries, and which therefore were unavailable to the MOVE Commission, we, the Special Investigating Grand Jury of May 15, 1986, have reviewed all of the events surrounding May 13th. Because of the powers peculiarly available to us, we have been able to conduct an exhaustive and dispositive investigation, and to determine whether any criminal charges are warranted. This has been a huge undertaking. The commitment of resources,

however, was well justified, as this incident demanded as full and complete an investigation as possible. We are satisfied that our investigation accomplished that goal.

More than one hundred and twenty-five witnesses appeared before us during the course of our inquiry. The quality, as well as the quantity, of this testimony warrants reference. One of the significant advantages of secret grand jury testimony is that witnesses are more candid and critical than those being questioned in a public forum such as the MOVE Commission. As a result, Police and Fire Department witnesses spoke more freely and critically before us than they had previously. Further, many others, who had earlier refused to testify, voluntarily appeared before us and testified under oath.

The investigating attorneys and investigators also interviewed a plethora of additional witnesses. For example, all neighbors within two blocks were interviewed. There was extensive interviewing of Fire Department personnel which went beyond interviews with every Fire Department official on the scene. Attorneys and investigators alike went out to fire stations to talk to every fire fighter who was present on May 13, 1985 to determine what they learned or saw. Interviews also were conducted with as many police officers on the scene as was possible. Many of the individuals thus interviewed as part of our investigation were not called to testify before us only because it was determined that they had nothing additional to offer which would be germane to our inquiry.

Nor did investigative efforts stop with these comprehensive interviews. The investigating attorneys reviewed all statements given to either the Police Department or the MOVE Commission by anyone connected with this event, all testimony given before and materials offered to the MOVE Commission, all of the notes of testimony from Ramona Africa's trial, and many other materials which previously were unavailable or which had not been fully utilized. By way of illustration, all known video or audio tapes from May 13, 1985 (including broadcast and unaired footage) were obtained and reviewed. Using these and other materials, what occurred on May 13, 1985 could be more accurately determined than previously, sometimes on a second-by-second basis. All known and existing radio and television tapes (again, both on- and off-the-air material) from all press conferences, news interviews and any other known media appearances relating to May 13, 1985 were also obtained and reviewed. As a result, when individuals such as Goode and Former Managing Director Leo Brooks were questioned before us, the attorneys were able to confront them with these materials, many of which the witnesses had not been able to review in preparing to testify. The entire MOVE Commission transcripts were also made part of the record before us. Frequently, witnesses testifying before us were questioned about the testimony adduced at those proceedings.

We are satisfied that, with one exception, we have heard from all witnesses, and have had access to all individuals and materials, either necessary or helpful to the inquiry. The

inherent nature of a grand jury investigation, and the way in which this investigation was conducted, accounted for the accessibility of many previously unavailable witnesses and sources of information. For example, the previously unaired and unavailable media film enabled us to reach new conclusions with respect to the spread of the fire which devastated the Osage Avenue area and to far more precisely determine the point at which the entire block was irrevocably lost to the inferno.

Similarly, various serious impediments to the MOVE Commission's functioning were of far less moment to our investigation. The Commission's inquiry, for example, was seriously hindered by the wall of silence thrown up by attorneys for some members of the Police Department. In his Forward to the Commission Report, Chairman William H. Brown, III, noted the existence of a "campaign to obstruct our investigation" and discussed at length the legal and other concerns raised by a single law firm's blanket representation of virtually all Fraternal Order of Police members. One of Brown's concerns about this arrangement was that "many of the individual officers clearly had dissimilar interests," with the result that collective representation could have a chilling effect on any potentially cooperative police witness. Our inquiry was not similarly thwarted. Rather, litigation initiated by the investigating attorneys from the District Attorney's Office resulted in court orders eliminating the previous blanket representation. Consequently, many police witnesses who had earlier followed the

advice of counsel and refused to testify were represented by new, separate counsel and voluntarily appeared before us.

Other tools were available to obtain the testimony of those few who still refused to cooperate in our search for the truth. In many instances, the investigating attorneys obtained rulings from the original supervising judge, the Honorable Juanita Kidd Stout, that a witness must testify because no basis existed for claiming a fifth amendment privilege. In those rare instances where a claim of privilege was upheld, we had available to us a unique tool, the use of which was recommended by the MOVE Commission: a limited grant of immunity to compel a witness' testimony. (Witnesses so treated are not immune from prosecution; rather, their immunized testimony cannot be used against them in any way.) We carefully and cautiously used that tool to call witnesses where appropriate. Thus, we were able to resolve open factual questions bearing upon issues which could not be fully explored other than by a Grand Jury.

The one potentially important witness from whom we did not hear was Ramona Johnson Africa. (As all MOVE members use the last name Africa, they will sometimes be referred to by their first names for purposes of clarity.) Testimony presented to us established that various investigators and investigating attorneys met with Ms. Africa for the purpose of securing her testimony. Her response was reported to us as belligerent, arrogant, and consistently uncooperative. She said that any decision as to whether she would testify had to be a "family decision." After

Ms. Africa conferred with her family -- MOVE members -- our investigators were informed that she would not testify.

We are, of course, well aware that a witness must invoke a fifth amendment privilege, and that a court must find that the privilege has been validly invoked, in order to refuse to testify before us. We are also well aware that such did not occur here. It was our judgment, however, that no purpose would be served by forcing Ms. Africa to testify. To do so would not have advanced the truth-determining process with which we have been concerned. This was clear from testimony offered by her in other proceedings which indicated that the "establishment's" judicial system, and the sanctity of the testimonial oath, are without meaning to her and to all other MOVE members. Had we compelled her presence, she would either have stood mute, or, more likely, used her appearance before us as a forum to speak out on behalf of MOVE and its beliefs, rather than to testify to relevant events. Since none of these alternatives was acceptable to us, we chose not to compel her testimony. Indeed, even had we invoked our contempt powers in an effort to do so, there would have been little incentive for her to testify truthfully before us given her beliefs and her present incarceration.

Notwithstanding Ramona Africa's practical unavailability, we believe that the investigation which we conducted was thorough. As a consequence of our work, many matters and issues pertinent to May 13th and its aftermath have been resolved and details with respect thereto can be specified.

Our investigation has revealed considerable incompetence and ineptitude. It has not, however, disclosed any actions which we believe warrant the filing of criminal charges. We sought to determine and reveal the truth, and to resolve the inconsistencies in the testimony heard by us. As is more fully specified in this report, we have conducted a definitive and exhaustive investigation which we believe achieves that goal. We heard more than one hundred and twenty-five witnesses. We have evaluated and considered, among other things, (1) the facts as testified to by those witnesses; (2) the credibility of their testimony; and (3) instructions with respect to the applicable law. Based thereon, it is our collective judgment that no criminal charges should be lodged. The specific reasons for that conclusion are set forth subsequently in this report.

Although we believe that our investigation was all-encompassing and this report is complete, we would be remiss in our obligations to the public if we did not briefly note certain difficulties which faced us by virtue of this incident's unique history. Grand jury investigations are, by their nature, secret investigations. The existence of a particular grand jury investigation frequently is not widely known; rarely are the contents of such investigations made public as they progress. These factors reduce the likelihood that actual or potential grand jury witnesses will compare and/or mold their recollections. Further, as developing testimony ordinarily is not widely aired, there also is no attendant risk that

such reports will inadvertently color or affect another witness' recollection.

Unfortunately, those conditions did not prevail with respect to this grand jury investigation because it was preceded by another, very public probe conducted by the MOVE Commission. Shortly after May 13, 1985, various individuals urged the convening of an investigating grand jury, a call not heeded by the then District Attorney. Instead, he successfully defeated a legal action brought to force a grand jury's empanelment, and chose instead to rely, at least in the first instance, on the MOVE Commission's inquiry. This course of action had some very substantial and rather unfortunate results.

From a practical viewpoint, the first and most obvious result of the decision not to immediately convene a grand jury was that our investigation had to follow the MOVE Commission's publicly aired inquiry. During the Commission hearings, participants and potential witnesses were able to sit before their television sets day after day and hear others' versions of the events of May 13th. These proceedings were also extensively reported by the print media; exact testimony was sometimes reproduced. Many of the witnesses who thereafter testified before us candidly stated that they could not be certain how much their recollections were colored or affected by their exposure to the publicly aired and printed testimony of others.

The MOVE Commission's formation also caused the issuance of an administrative directive that the investigation already in

progress by the Police Department's Homicide Unit should not proceed. The theory behind this order was that it should not appear that the Department was attempting to interfere with or obstruct the Commission's efforts. One unfortunate result of this directive was that detailed, specific statements which could have been promptly taken by detectives having some overall knowledge of the case were not obtained. Instead, Police Department questioning was halted after the generation of less helpful, and often confusing and misleading, "preformat" statements which were the product of interviews conducted by police officers not so familiar with the case. (In these interviews, police witnesses simply answered a standard set of questions which bore no relationship to the role of the individual officer being interviewed.) Inaccuracies and misunderstandings may also have arisen because it subsequently was the consistent policy of the MOVE Commission investigators, when they later took over the investigatory efforts, not to allow the individuals interviewed immediately to review and correct the investigatory summaries of those interviews. The possibility also cannot be discounted -- although we have found no evidence specifically supporting such a theory -- that some witnesses used the hiatus before this investigation was commenced to mold their testimony, after having the benefit of hearing others and seeing what matters were of interest to those investigating under the Mayor's mandate. Moreover, at the very least, the delay in convening this grand jury investigation created the possibility that

the passage of time dimmed the memories of some witnesses on whom we had to rely.

In making these points and raising these possibilities, we do not intend to criticize the work of the MOVE Commission or its members. While we differ with some of their analysis and conclusions, we believe that the Commissioners acted professionally and performed a valuable public service. For that they should be commended. The fact remains, however, that, by preceding this Grand Jury, pursuant to the Mayor's directive, the Commission inadvertently may have shaped or affected the testimony available for us. The possibility also exists that they created legal problems (more fully discussed later) which could have been very significant had criminal charges been brought.

By way of introduction, it remains only for us to briefly outline the format and objectives of our report. Based on the necessarily limited evidence available to them, and absent substantial legal analysis, the MOVE Commission offered in its final report not a narrative of events but numerous factual findings and putative legal conclusions with respect to certain conduct which occurred. For example, absent the duty or authority to issue criminal charges, the Commissioners felt free to label certain conduct as "grossly negligent" and other conduct as "reckless," terms which are statutorily defined for purposes of charging individuals with crimes. In contrast, we have chosen to discuss at length not only the events of May 13th but also all significant

preceding and succeeding events and to include in those discussions our factual findings and legal conclusions. The latter are based on legal analysis which was not undertaken by the Commission. In that way the basis for our disagreement with certain of the Commission's findings and conclusions will be clear. Otherwise stated, we have undertaken in this report to fully summarize, discuss and analyze one of the most massive grand jury investigations in Pennsylvania history.

Additionally, we have determined that we will offer only very limited recommendations. One of the MOVE Commission's accomplishments was to offer numerous suggestions regarding (1) the future operations of City government and City departments, (2) local responses to crisis situations, and (3) the proper enforcement of certain laws and regulations. We believe that such matters, which were particularly addressed to the proper functioning of City government, are best left to and most appropriately discussed by a Commission convened by the City's Chief Executive. Our recommendations, therefore, are far fewer in number and relate primarily, but not exclusively, to the enforcement of the criminal laws, the principal focus of our inquiry.

Lastly, it would be impossible to duplicate in this report the public outrage which surfaced in the wake of this disaster and to even try to do so would be less helpful than the path we have chosen: To lay out in one cohesive and dispassionate document the essential facts as we find them to be, together with our analysis and explanations as to why charges will not be brought.

We have conducted a far-reaching and comprehensive investigation. The facts, as we find them to be, can and should speak for themselves.

Our detailed report follows.

II. HISTORY OF MOVE

The police who sought to serve search and arrest warrants at 6221 Osage Avenue, Philadelphia, early on May 13, 1985, faced a remarkable urban scene: A fortified city rowhouse with three rooftop structures, two of which were bunkers. The extensive nature of the fortifications, however, did not become readily apparent until later in the day as the assault on the house progressed.

As of May, 1985, nearly two decades had passed since MOVE's founding. During that time, the group had evolved from a small, non-violent, back-to-nature organization, to an extremist group, well-practiced in the art of urban terrorism. Founded by Vincent Leaphart, who was later known as John Africa, MOVE first appeared in Philadelphia in the mid to late 1960's. Initially, this peaceful group demonstrated for various causes and was philosophically opposed to modern technology. Some witnesses told us that the name "MOVE" was meaningless. One witness, however, said that they began with the concept "movement on vocational education" and adopted their name because they "favored movement, rather than stagnation."

By the early 1970's, MOVE was regularly demonstrating to express their beliefs in the natural law. They sought, for example, to have zoo animals returned to their natural habitat. During their protests, they began to use extreme profanity and to engage in unruly and other behavior which caused them to be arrested.

Their subsequent court appearances were punctuated by both disruptions and contempt citations. These, in turn, resulted in jailings. While members were jailed, the group's membership grew. (Although MOVE members themselves distinguish among members, supporters and sympathizers, this report will use the term "member" to include all those adults closely associated with MOVE.)

MOVE remained a non-violent -- but highly vocal -- radical group until the spring of 1977, when members appeared at their West Philadelphia house wearing fatigues and brandishing weapons. Arrest warrants were subsequently authorized for some members, but not served. A protracted period of negotiations between the City Administration of Mayor Frank L. Rizzo and MOVE followed concerning the service of the warrants, as well as the abatement of the numerous health and other code violations associated with MOVE's back-to-nature life style. By 1978, the MOVE residence was not only a health hazard but also a fortified compound.

Ultimately, on August 8, 1978, after all negotiations failed, the City sought to evict MOVE from their Powelton Village home based on a Common Pleas Court eviction order. This action was preceded by a lengthy and futile attempt to restrict access to the house and to "starve out" the residents in order to avoid violence with the heavily fortified and armed MOVE members. The plan to accomplish the eviction was prepared three months prior to its implementation, and rehearsed and finalized for another six to eight weeks. The intent of the planners was to evict the house's residents without injury, using the least possible force.

The City's plan unfortunately failed. MOVE refused to surrender and retreated to the house's fortified basement by the time the police entered. A gunfight followed. No MOVE lives were lost. However, five police officers and several firemen were wounded -- two severely -- and Police Officer James Ramp was killed before smoke and water forced MOVE's surrender. Subsequently, nine adult MOVE members were convicted of Officer Ramp's murder.

For four or so years after the 1978 eviction and shootout, MOVE was substantially less visible. In the early 1980's, police learned that group members were residing in three West Philadelphia houses, including 6221 Osage Avenue, the home of Louise James, mother of MOVE member Frank James Africa. Various MOVE children and one adult arrived there in 1982. This was one of the two MOVE residences in which outside loudspeakers were installed.

Beginning in 1982, complaints were made about the behavior of the 6221 Osage Avenue occupants who were far more aggressive than the residents of other MOVE houses. Police conducted surveillances over the next 2-1/2 or so years but were ordered by the City Administration to avoid confrontations with MOVE members despite the complaints of many citizens about their activities.

MOVE members did not restrict their disruptive activities to harassment of their Osage Avenue neighbors. Between November of 1982 and January of 1983, they sent threatening letters to ten Philadelphia judges and somewhat less threatening letters to various state and national officials. No charges were brought as a

result of these letters. The judge who had presided at the earlier murder trial of MOVE members, however, was placed under guard because of the violent nature of the threats made.

In the months following, MOVE's behavior became increasingly violent and anti-social. In April of 1983, for example, a former MOVE member was attacked and injured merely because he was earning a living and engaging in a somewhat normal lifestyle.

Life for the neighbors also became increasingly unbearable. MOVE members' poor hygiene and their many animals, who fed off raw meat and garbage left outside by the group, caused insects and rodents to invade the neighborhood. In September of 1983, a neighbor, who sought to rid his house of these vermin by using an exterminator, was assaulted by MOVE members who objected to the killing of insects. No action was taken against the attackers. That same month, the MOVE members erected fences which blocked the rear alley serving all of the houses on the block. If neighbors wished access to their garages from that end of the block, they were required to walk around to the front of 6221, ring the bell under a posted sign, and wait to see if MOVE would allow them to use the alley to reach their homes.

Attempts by neighbors to obtain help to stop these various indignities went unheeded by City agencies. Politicians who were approached counselled restraint until after the mayoral election, assuring residents that the new mayor (W. Wilson Goode) would help them.

Life, however, became worse on Osage Avenue after Goode's election. Beginning on Christmas eve of 1983, the outside loudspeaker was used extensively to spew profanities, threats and harangues. We heard testimony that such harangues -- which could be heard as far away as Upper Darby -- would sometimes begin at noon and last until 2:00 a.m. We also learned that MOVE members would often run across the neighbors' roofs, sometimes knocking down their TV antennas. MOVE members also paraded on these roofs with guns, and slept on their own roof.

In 1984 the house at 6221 Osage Avenue was substantially modified. The windows were barricaded with slats; in March a hatch appeared in the roof. By May, numerous free-standing building materials were on the roof. The harangues and threats also continued. On May 20, 1984, MOVE members stated that they would kill the Mayor and his bodyguards, and "blow up" other politicians, including those in the White House. On May 22, 1984, they threatened to kill any "cop" who came to the house.

After meeting with the residents to discuss their concerns, in late May of 1984 Goode met with, among other people, Edward Dennis, the United States Attorney for the Eastern District of Pennsylvania, in the hope of enlisting federal help. Dennis said, however, that simple loudspeaker threats did not warrant his intervention. He did acknowledge an outstanding federal warrant for John Africa, but refused to act on it without concrete evidence that Africa was in the house.

The situation on Osage Avenue thus continued to deteriorate, with the City Administration taking no action other than the sporadic monitoring of MOVE. In June, considerable dirt was removed from the house, causing speculation that MOVE was digging tunnels. That same month, a MOVE member threatened to kill a police officer at a court hearing in an unrelated matter. MOVE began hanging raw meat on the house fences for a variety of animals to eat, and continued to build up rooftop materials. At a July, 1984 meeting with neighborhood residents, Goode reiterated a May statement that there was no legal basis for the City to act with respect to the problems they faced. The only positive results of the July meeting were the City's commitment to fix a blocked street drain and to provide mental health treatment for children affected by the neighborhood's atmosphere.

Goode's July 1984 disavowal of any legal basis to act was in conflict with his knowledge of the facts. In June, the entire legal situation with respect to Osage Avenue was reviewed by the District Attorney's Office at the Mayor's request. The memorandum which was prepared in response to the Mayor's request stated, without qualification, that probable cause existed to obtain a search warrant for explosives and weapons in the house and arrest warrants for some of its residents. It further noted the existence of open bench warrants for various occupants. That memo was forwarded to the Mayor on June 22, 1984 by then District Attorney Edward G. Rendell. In his cover letter, the District Attorney stated "it is imperative to do something as quickly as

possible, before the situation grows even worse and before MOVE members receive a higher profile from increased media attention.

Given the material which he received from Rendell, we are troubled by Goode's public statements in July of 1984 to the residents, on May 14, 1985 in a television address to the City, and in later sworn testimony before the MOVE Commission, that until May of 1985 there was no legal basis to proceed against MOVE. His testimony before us, the Mayor, for the first time, explained what he meant by his pronouncement that no legal basis existed:

> Q. Now, moving ahead in time to after May 13, 1985, you on numerous occasions spoke to the citizens of Philadelphia and informed them that there was no legal basis to proceed against MOVE in 1984; is that correct?
>
> A. That is correct.
>
> Q. Would you explain, since the ordinary lay person would interpret that to mean that there were not any facts to support any type of arrests in this case, would you explain what you meant by that statement?
>
> A. What I meant by that statement was that we did not have warrants signed by a Judge that we could go into the house and, in fact, make arrests as I understood the facts to be at that time.
>
> Q. And there was a decision made by yourself and other members of the government that that step of going to a Judge and seeking arrest warrants based on facts which make out crimes should not be done; is that correct?
>
> A. I would point out that the answer to your question is yes....

The Mayor's decision not to seek viable criminal warrants, and to misleadingly state in July that no legal basis existed for thus proceeding despite his knowledge to the contrary, was

apparently the product of his desire to wait out the August 8, 1984 anniversary of the Powelton Village eviction and murder. The rationale of that decision, however, was never satisfactorily explained to us.

Information in the City's possession with respect to the possibility of an August 8, 1984 confrontation was obtained from Louise James. Ms. James approached authorities in February 1984, after she was attacked by her son Frank at the direction of John Africa, her brother. Although uncertain whether her information was credible, the police were instructed to prepare a responsive plan in the event that her information was correct. This 1984 plan was developed under the supervision of Sergeant Herb Kirk, a firearms supervisor at the Police Academy. Kirk met with various City departments, including the Fire, Water and Health Departments, and solicited the help of Lieutenant Frank Powell, Officer William Klein and other Bomb Disposal Unit members. The plan's overall goal was to remove 6221's occupants on August 8, 1984, with little or no injury to anyone in the event that MOVE initiated a confrontation.

The situation in July and August of 1984 was substantially different than it would be in May of 1985. In 1984, the MOVE compound's rooftop trap door was surrounded only by a three- to four-foot high square pile of unsecured wooden pallets. According to the 1984 plan, the police would first clear the rooftop area and expose the trap door by using "squirts" (Fire Department hoses mounted on trucks). Next, an assault team, including Kirk,

Powell and Klein, would scale the roof and place an entry device (explosive charge) on the roof just over the party wall. The device's purpose was to blow a small hole, about eight inches in diameter. They would use a water charge to accomplish this: a Tupperware container of water, wrapped in "det" (detonation) cord which, when exploded, would propel the water through the roof, thus making a small hole with minimal risks.

In order to be sure that device would accomplish precisely what was intended -- no less and no more -- there was extensive testing at the Fire Academy. Kirk told us that, after obtaining information about the roof's construction,

> ... we experimented with various amounts of explosives and water to see how long it would take to get through this roof top. After four or five days of experimentation, we developed a charge which when detonated would blow right through the roof top and through the second floor ceiling and make an entry hole about eight to ten inches in diameter... Once we had developed the charge so that it would open the hole up in this roof top everytime, we placed Officer Kline [sic] in a bomb protective suit and we placed this charge about 15 feet from him and detonated it. We wanted to see what the blast effect was ... Officer Kline [sic] volunteered to get into the suit and take this shock. When we were experimenting with the roof top, we had placed underneath the roof top cardboard dummies to see what effect the downward force of the water explosive would do to this cardboard dummy, whether it would tear it apart or cut it or anything ... the only damage to these cardboard dummies was that they would get a little dust debris....

After breaching the roof, the Kirk plan called for the insertion of a high volume of tear gas which would drive out the occupants even if they had tear gas masks. After the evacuation,

officers wearing breathing apparatus would enter to search for any injured people. Also included in the plan was a helicopter, primarily for aerial observation to be certain that no MOVE members were on other roofs. Finally, it was intended that the MOVE children would be taken into protective custody prior to any confrontation. No steps (such as obtaining the necessary court orders) were taken, however, to accomplish this latter goal in advance of the anticipated August 8, 1984 confrontation.

If the original plan was not successful, there was also an alternative plan developed to breach 6221 Osage Avenue using shape charges on an adjoining east or west wall and there to insert tear gas. The entire plan, including this alternative approach, was reduced to writing -- one copy only. According to it, each officer participant had an assigned weapon; weapon "freelancing" was not permitted.

On August 8, 1984, the City administration was prepared if MOVE created a confrontation with neighbors and police. Hundreds of police, in fact, were in position near the house, although not visible to MOVE. The day passed quietly, however. Relieved, the City did not, either immediately or subsequently, consider proceeding with the legal options previously outlined by the District Attorney.

As a result of the City's inaction, the situation on Osage Avenue worsened. MOVE's fortifications were dramatically increased in the months following. With the cold weather's arrival, however, many of MOVE's offensive activities stopped. Although the back

alley-driveway remained blocked, the loudspeaker threats abated and the odors and health hazards were less offensive. Complaints were made by the neighbors about lumber piled in front of their houses, however, and substantial construction activity by MOVE was apparent. More dirt was taken out of the house, large trees were taken in, and three separate rooftop structures were built two of them bunkers. The lack of official action in response to this activity was apparently based on a hope or belief that the entire matter would somehow run its course and fade away. Mayor Goode himself told us that, between August of 1984 and May of 1985, he felt that the City could wait and perhaps mediate the problem. He attempted to explain the failure of the City to respond:

> Q. What did you really think was going to happen between 1984 and 1985, except thinking that things were going to get worse?
>
> A. First of all, there were a lot of reports at that time that they were talking about moving their location out of the City ... there was information coming from Gerald Ford Africa that, in fact, they may decide to go to Richmond. We had numerous reports in that time frame as to what they likely would do. And, therefore, I didn't have any strong reason to believe that this would necessarily end at some point in the future in a violent confrontation....
>
> Q. So your hope was that they may leave, and when they did not, and the situation got worse, there was a realization that the City had to respond if there was a legal basis to do so?
>
> A. That is correct, sir.

The City's refusal to act after August, 1984, was, at best, extraordinarily unfortunate. As spring approached, MOVE became more volatile and disruptive than ever before. Neighbors were attacked and harangued over the loudspeaker at all hours. What was a bad situation by the end of February was far worse by the end of April as virtually every form of MOVE's anti-social behavior continued unabated. MOVE's ability both to terroriże and to intimidate was further enhanced by the three ominous structures on their roof giving them clear tactical superiority over what had once been a quiet, middle-class neighborhood.

That the situation on Osage Avenue had reached such a point by April of 1985 was, without doubt, the product of the nonconfrontation policy which had been followed by the City to that date, despite the clear legal basis for proceeding criminally outlined earlier. The policy, which extended to all operating departments, was to avoid any confrontations with MOVE members at or near their residence, absent prior approval. Goode told us that he approved the policy of not sending civilian inspectors and similar individuals to the house because of the possibility of injury to them and out of a desire to protect them. He said that he understood the policy to mean that

> inspectors from the Department of L & I, or from the Gas Works or from the Electric Company, non-law enforcement persons, would not go to the door without some type of clearance from the Police Commissioner or the Managing Director to do so. It need not be approved by me, but it needed to be some type of understanding they would not just walk to the door.

Former Managing Director Leo Brooks, former Police Commissioner Sambor and other officials, however, all testified that they understood the nonconfrontation policy to extend to the police. Brooks added that it was the Mayor who had the final word on the policy.

The plain effect of the nonconfrontation policy was to place the residents of 6221 Osage Avenue above the law. That policy continued although assaults and other very substantial problems were related to the Mayor at a March 9, 1984 meeting. As a consequence, MOVE was not sanctioned either for their refusal to pay utility bills, or for their violations of the Health and City Codes, or for their violations of the Criminal Code. For example although their use of the loudspeaker constituted a clear basis for disorderly conduct charges, none was brought. Neither were there attempts to force the removal of the loudspeaker. Although physical assaults were witnessed, no assault charges were brought On one occasion, police saw Frank James Africa attack Alfonzo Leaphart with an ax outside of 6221 Osage Avenue. Frank James, the weapon wielder, returned to the house and was not arrested. Leaphart, however, a non-MOVE member who had come into the area to confront his brother, John Africa, was taken into custody to "keep the peace." Although not eventually charged, the police extracted from Leaphart a promise not to return to the house. Similarly, the State Parole Board was discouraged from serving Frank James Africa and Larry Howard with outstanding fugitive warrants at the house.

We have considered, as we are bound to do, whether the Mayor's failure to act, especially once a basis to act was spelled out in June of 1984, merits the lodging of any criminal charges against him. We have concluded that it does not. In reaching that result, we are aware that omission may be the basis for criminal liability if a duty to perform the omitted act is imposed by law (18 Pa.C.S.A. §301(b)(2)). We have also been instructed that the Home Rule Charter imposes upon the Mayor responsibility for law enforcement (Article IV, Chapter I, §4-100).

Bearing these points in mind, the failure to act between June or August of 1984 and May of 1985, and the possibly imprudent actions of the City from the end of April, 1985 to May 12, 1985 (which are more fully discussed later), initially appear to support charges of reckless endangerment, set forth at 18 Pa.C.S.A. §2705, which provides:

> Recklessly Endangering Another Person. A person commits a misdemeanor of the second degree if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury.

In order to convict someone of this crime, however, it must be proved beyond a reasonable doubt that the individual acted "recklessly," as that term is statutorily defined. (Compare the MOVE Commission's more informal use of this and other terms.) This requires proof that the individual acted with a conscious disregard of a substantial and unjustifiable risk. Specifically, under 18 Pa.C.S.A. §302(b)(3) of the Crimes Code:

> A person acts recklessly with respect to a material element of an offense when

> he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and intent of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation.

(emphasis added).

Unlike the MOVE Commission, we will use terms such as "reckless" and "negligent" not as they are used in common speech, but only as they are set forth in the Crimes Code. Following that approach and analysis, we have concluded that the available evidence does not support a conclusion that Goode's actions were "reckless" as that term is statutorily defined.

We have already noted the Mayor's testimony that he did not act between August 1984 and May 1985 because there was "talk" that MOVE would relocate from Philadelphia, obviating the need for any City action at all. Although MOVE's continued fortification of its house in the winter of 1984-1985 makes this reliance on such talk questionable, the initial inaction nonetheless could be considered defensible (i.e., not reckless) because the extreme likelihood that any confrontation would be violent (as evidenced by the 1978 incident) made its complete avoidance at least an objective worthy of consideration. Moreover, as is more fully discussed subsequently, when Goode finally decided to take action he did instruct then Police Commissioner Sambor to prepare a plan that would safeguard the lives of all involved, and he also instructed the Human Services Commissioner, Irene Pernsley, to

take the necessary steps to remove the children. These actions were not undertaken, however, despite the Mayor's orders.

As is more fully discussed subsequently, Goode did not wait to execute the plan when he learned that the children had not been picked up. He explained that this was because he "was given and approved a plan that indicated ... that [the police] could safely remove the persons ... without causing harm to them." And, indeed, the plan as originally formulated utilized only non-lethal tactics (principally water and tear gas), and even the hatch charges that were intended to be used had been tested and found to be safe. For all of these reasons, we conclude that neither Goode's initial inaction, nor his approval of the plan as formulated, were reckless, and, thus, that he could not, for these reasons, be prosecuted for reckless endangerment.

We have also considered whether the Mayor's decision to proceed with the plan on May 13, 1985 was reckless because, even though the police would only fire at "sure targets," (1) suppressive fire might be necessary, and (2) there was no guarantee that the children would be in the basement and protected from all police gunfire. The available evidence, however, does not support a conclusion that Goode was aware of these factors or that he consciously disregarded them. Hence, we have concluded that no charges are warranted under these theories.

Finally, we have considered the Mayor's failure to act well before May 13, 1985. There is no doubt in our mind, whatsoever, that the Mayor's refusal to act sooner was, at a minimum, extremely

unfortunate. Further, the situation which resulted from that inaction is highly ironic in that the evidence before us demonstrates that the charges brought in 1985 were virtually the same charges which could have been brought in 1984 before 6221's extensive fortification. This was acknowledged by Goode himself in his testimony before us:

> Q. The same condition which existed in 1984 again existed in 1985 with the exception of one more individual with charges that could be made against him; is that correct?
>
> A. I would concur that essentially the same charges that were put forth in 1985 were there in 1984, could have been done in 1984.

Given this, we have sought to determine what caused the City to act in May 1985 in the face of its prior extensive and deliberate refusals to do so. A number of facts appear to us to have solidified or, perhaps, compelled the Mayor's resolve. The Mayor admitted that Councilman Lucien Blackwell came to him and expresse his concern about the situation. The neighbors became far more vocal, forceful and visible than previously. In April and May they met various politicians, sought out the media, and held a press conference. As MOVE's work on its fortifications continued, the media editorialized in favor of City action on behalf of the neighbors who deserved peace and protection. These neighbors also approached the governor for help, and it was perceived by some Philadelphians as "not looking good" for Philadelphia politicians that state help had been sought. Finally, and perhaps most importantly, the neighbors threatened to take matters into their own hands.

Such actions by the neighbors were precisely MOVE's goals. During a May 1984 negotiation session with Benjamin Swans, Jr., of the Crisis Intervention Network, MOVE members said that they believed "that through the alienation of the residents, that it would bring the city to the point of confrontation or compromise as it related to the release of the persons arrested ... in the 1978 shootout."

MOVE's strategy unfortunately succeeded. In the face of all of these occurrences and pressures, in May, 1985 the City finally responded, using the same legal remedies that had been available in 1984. By that time, however, three rooftop structures including a huge bunker had been constructed, making a tactical plan almost impossible and, most importantly, extremely dangerous for the officers who would attempt to carry it out.

III. PLANNING FOR THE SERVICE OF WARRANTS AT 6221 OSAGE AVENUE

Planning for the confrontation with MOVE, which the Mayor finally recognized was both inevitable and necessary, occurred at two levels. City officials (including the Mayor, the Police Commissioner, the City Solicitor and the District Attorney) initially met to discuss various strategies for dealing with MOVE, such as continuing the policy of nonconfrontation, pursuing civil remedies or initiating criminal process. Simultaneously, Police Department personnel met to develop a tactical plan to be implemented if the City elected to proceed criminally. The series of strategic and tactical meetings held in preparation for a confrontation are discussed first. Next, we detail the tactical plan ultimately devised for execution of the warrants, with brief consideration given to planning options which were explored but rejected. Lastly, we discuss the numerous deficiencies in the planning.

During our investigation we heard lengthy testimony from many witnesses about the City's development of the plan. This testimony revealed a blatant abdication of responsibility within the Police Department for formulating a plan, and a parallel abdication of responsibility within the Mayor's cabinet for executing the plan.

The responsibility for formulating a plan for a confrontation with MOVE was assumed by a non-ranking firearms instructor from the Police Academy, a sergeant from the Pistol Range, and

the commanding officer of the Bomb Disposal Unit. The supervisors of these men, the commanding officers of the Tactical Division and the Stake Out Unit, contributed virtually nothing. Similarly, the responsibility for executing the plan, although formally assumed by the Mayor and the Managing Director, was borne in reality by the Police Commissioner, who was at the center of almost every critical decision concerning May 13, 1985. The reasons for this amazing leadership void among the Police Department's command personnel, mirrored by a similar refusal to assume responsibility within the Mayor's cabinet, became apparent from the testimony offered to us.

A. The City's Decision to Proceed Against MOVE and Its Development of the Plan

Development of the tactical plan by the Police Department

In response to the escalating tensions on Osage Avenue, but entirely on his own initiative, Police Commissioner Gregore Sambor began at the end of April, 1985, to plan for a confrontation with MOVE, which had begun to appear likely. On or about April 30, 1985, Sambor convened a very brief meeting with Inspector John Tiers, the commanding officer of the Tactical Division; Captain Richard Kirchner, the commanding officer of the Stake Out Unit; Lieutenant Frank Powell, the commanding officer of the Bomb Disposal Unit; Detectives Nathan Benner and Thomas Boyd of the Major Investigations Division's Intelligence Unit; Sergeant Albert

Revel from the Pistol Range; and other officers. (The Stake Out and Bomb Disposal Units are subdivisions of the Tactical Division. Similarly, the Pistol Range personnel are part of the Tactical Division.) Sambor informed the officers that the City might take action against MOVE, and directed Revel to find the 1984 plan developed by his predecessor, Sergeant Kirk.

Revel, along with Powell (who had been involved in planning for the confrontation expected in August, 1984), searched unsuccessfully for a written copy of the 1984 plan. Subsequently, Powell sent Sambor a memo informing him that, in any event, MOVE's newly constructed bunker rendered the 1984 plan tactically infeasible. A few days later, on or about May 2, 1985, Powell, Revel, Kirchner, Benner and Boyd met informally at the Police Academy. Revel also asked one of his subordinate police officers, Michael Tursi, a firearms instructor at the Pistol Range who knew the weapons and personnel available at the Range, to attend the meeting. Powell then informed those present that the 1984 plan was not feasible, and that they should begin devising a new one.

According to Powell, "the real reason" that he and others arranged this meeting was to force Kirchner, whom Powell felt wanted to avoid making decisions, to assume responsibility for developing a plan. Powell said that he emphatically told Kirchner and Tiers at the meeting that it was their responsibility to devise a plan, and that if they needed any help from the Bomb Disposal Unit or Pistol Range to let them know. Powell recalled that Kirchner then responded: "Fuck it. Go in there

with two Stake Out Units and drag them out by the hair. If they give me any shit, we'll shoot them." Tursi testified to a similar recollection of this comment, adding that he had not regarded it as mere rhetoric and had expressed his concern to Revel (his superior) that the command structure of the Police Department was approaching the situation with the wrong mentality. According to Powell, after the meeting Tursi expressed his fears that any plan Kirchner devised would pose serious, unnecessary risks to the police. Tursi then persuaded Powell to help him formulate a plan.

In the subsequent days, Tursi, Powell and Revel went to Osage Avenue, spoke with neighbors and police assigned to the area, reviewed photographs, tested explosives and explored various options for the confrontation with MOVE. Powell said that, as they worked, he asked various Stake Out officers to review the plan and offer criticisms. He also discussed the plan with an agent from the Special Weapons and Tactics (SWAT) Unit of the Federal Bureau of Investigation (FBI), who told Powell he thought the plan he was developing was sound. Finally, Tursi and Powell repeatedly requested comments and criticisms in a series of meetings with Police Department personnel (detailed below), but none was offered.

On May 7, 1985, Tursi, Powell, Revel, Tiers, Kirchner, Benner, Boyd and other officers met again at the Police Academy. Tursi and Powell discussed the plan they were devising. According to Revel, no one expressed any objections or reservations; further,

neither Tiers nor Kirchner offered any help with the tactical planning.

Powell further testified that on Wednesday, May 8, 1985, immediately after being told to attend a meeting at Sambor's office the next morning, Tiers phoned him. Tiers asked him whether he had a plan, and then said "Well, we got to have a plan. The Commissioner [Sambor] wants a plan. We ain't got nothing and we're in trouble. Can we use your plan?" Revel agreed to let Tiers, his superior, use their plan.

The next morning, at Tiers' request, Powell, Revel and Tursi went to Stake Out Headquarters to show their plan to Tiers. Tursi testified that they gave Tiers a copy, "and if he had any input, that would have been the time that he would have given it to us. But all he did was take the plan and say 'OK, that's it. We'll go with this.' And then we went directly to [Sambor's] office around 9:00." There, Tursi presented the plan to Sambor as one "drawn up by the Police Academy," which would have included units under the command of Tiers, Kirchner and Powell.

On Thursday, May 9, 1985, Sambor convened another meeting at the Police Administration Building (PAB), attended by police command personnel, including Edward McLaughlin, the captain of the Major Investigations Division, Neil Shanahan, the captain of the Civil Affairs Unit, Tiers and Kirchner. Powell, Revel, Tursi, Benner and Boyd were also present. Two members of the FBI's SWAT team and an FBI bomb technician also attended at the Police Department's request. Tursi presented the plan. No one offered any

criticisms or comments. Powell testified "[Sambor] seemed to accept it as it was. I cannot even recall him asking any questions." Similarly, Tursi testified that "[W]e asked all the command personnel in the room to play the devil's advocate with this thing again to see if they saw anything wrong anywhere down the line, and not one change or suggestion was made." No date for the operation was set during the meeting, although Sambor asked everyone to return on Saturday, May 11, 1985.

Sambor held the next meeting on Saturday morning, May 11, 1985, at the PAB. Although the three FBI agents had been invited to attend, they did not. This was the first meeting to which any members of the Fire Department were invited; Fire Commissioner William Richmond, Deputy Fire Commissioner Frank Scipione and Deputy Fire Chief Walter Miller were present. Almost the entire command structure of the Police Department, from the Commissioner and his deputies down to the commanding officer of the police garage, were also present, as well as those who already had been involved in the planning discussions (Kirchner, Tiers, Shanahan, McLaughlin, Benner, Boyd, Powell, Revel, Tursi and Deputy City Solicitor Ralph Teti). Tursi briefed everyone on the plan. Despite his requests for input, no one offered any criticisms. To Tursi's recollection, only one question was asked during the entire meeting: Chief Inspector Craig asked whether the chemical agents to be used would harm the children. Additionally, Richmond and Scipione offered suggestions and information concerning use of the fire equipment.

Asked whether he thought it was apparent to Sambor that his tactical people were not having any input, Tursi testified:

> [I]f you could picture it, there was just about virtually every police commander you could think of sitting around this table that had any importance at all in the command structure, and [Sambor] would say something like, "All right, somebody brief us on the plan here." And everybody turns around and looks at each other like, "Well, gee, I'm not going to do it." They're trying to hide under their damn chairs. Finally, he just turned around and said, "All right, Mike, get up here and brief us on this thing." That's basically the way it went.

When testifying before us, Sambor attempted to justify giving two individuals from the Range and one from the Bomb Disposal Unit the responsibility for formulating a plan. He said:

> I had noticed on other times where the practical considerations of what the individuals on the street ... that actually had to do the job were not considered. And I wanted to make sure that those aspects of this operation, if it did occur, would be considered. So the people who actually had to do it, that would have been ... cranked into the plan from the beginning.

In any event, in accordance with the plan as outlined, by Saturday afternoon, a Philadelphia Common Pleas Court judge had signed arrest and search warrants, the houses to be used as police posts had been selected, and Powell had chosen at least some officers for the operation. Further, Sambor had arbitrarily selected Monday, May 13, 1985 as the date for executing the warrants in a meeting with the Mayor and others the preceding Thursday.

The final meeting before the plan's execution was held in the early morning hours of May 13, 1985, at the Geriatric Center

at 63rd and Walnut Streets. At that meeting, Kirchner, Powell and Sergeant Edward Connor briefed everyone on the plan, which was essentially unchanged from that which had been presented on Saturday morning.

Planning by City officials

While uniformed police personnel were devising a tactical plan during the early weeks of May, 1985, City officials held their own series of meetings to decide on a course of conduct to control the deteriorating situation.

On Friday, May 3, 1985, Goode met with Brooks, Sambor, District Attorney Edward Rendell, City Councilman Lucien Blackwell and City Solicitor Barbara Mather to discuss options for proceeding against MOVE. After reviewing the most recent neighborhood incidents, Mather offered her opinion that any civil action against MOVE would be slow, cumbersome and, in the end, would only result in the issuance of arrest warrants. As he had the year before, Goode asked Rendell to determine whether there was any legal basis for proceeding against MOVE criminally. Because those present conveyed a sense of urgency about the matter, Rendell agreed to interview police and Osage Avenue residents and review the evidence over the weekend, and to present his conclusions to Goode on Monday, May 6, 1985. On that day, Rendell informed Goode, as he had the year before, that there was sufficient evidence to support arrest and search warrants.

On Tuesday, May 7, 1985, Goode met with Brooks, Sambor, Rendell, Teti and others. The Mayor then asked Rendell to prepare the warrants as quickly as possible and instructed Sambor to prepare a plan for their execution. According to Rendell, Goode turned to Brooks and Sambor at the meeting's conclusion and said something to the effect that he had confidence in them and they need not keep him informed of all of the details.

Two days later, on May 9, 1985, Goode met with Sambor, Rendell and Mather. (Brooks was in Virginia on personal matters from Wednesday morning, May 8, 1985 until Sunday night, May 12, 1985; while absent, he was not contacted concerning the operation. Rendell informed Goode, Sambor and Mather that the warrants were ready. Sambor suggested serving them on Monday, May 13, 1985. Although Goode initially expressed reluctance to proceed then because of possible difficulties in evacuating the neighborhood on Sunday, May 12, 1985 (Mother's Day), Sambor wanted to proceed because he felt any delay would only give MOVE more time to prepare. Goode ultimately acquiesced, telling Sambor it was his operation and his call in the end. Rendell testified that when he asked Sambor whether the police intended to use water and tear gas as they had in 1978, Goode interjected that he had confidence in Sambor and did not need to know the details of the plan.

City officials did not meet all together again. Brooks, who had had no communication with anyone regarding the plan since May 7, 1985, returned to Philadelphia on the evening of May 12, 1985. At 9:00 p.m., he met with Sambor, who (in Brooks' words) briefed

him on the plan's "highlights." Next, Brooks called Goode to brief him. (Sambor had already briefed Goode privately on May 11, 1985, but Brooks called Goode nonetheless.) Brooks and Goode then agreed that Brooks would go to the Geriatric Center before 5:00 a.m., where he would remain, keeping Goode informed by phone. The Police and Fire Commissioners, the Commissioner of Licenses and Inspections and other City officials would also be there. Goode said that Brooks urged him "in the strongest manner possible" not to come to the Geriatric Center, but to remain in City Hall. Goode acquiesced.

The testimony heard by us revealed an abdication of responsibility among the Mayor's cabinet for executing the plan. Goode, Brooks, Sambor and Richmond, although responsible for executing the plan, were the players least familiar with it. This lack of familiarity with the plan, and the tactical considerations underlying it, contributed to the May 13, 1985 disaster. Had these key decision-makers sought a more intimate knowledge of the situation and the tactical operation, they presumably could have evaluated more knowledgeably the various suggested courses of action (such as bombing an occupied rowhouse), rather than merely deferring to subordinates' recommendations. Absent this hands-on knowledge, intelligent questions or thoughtful consideration of options was hardly possible. As a result, ultimate decision-makers were left with no course but to approve or reject subordinates'

recommendations based on their level of confidence in the subordi nate rather than the wisdom of the recommendation.

Here, decision-makers such as Goode and Brooks lacked a real working knowledge of the situation and, thus, were ill-prepared to make decisions. Goode not only lacked the necessary knowledge but also declined to ask questions so as to acquire this knowledg Finally, he appeared to insulate himself from such knowledge, instructing his subordinates (at least according to some witnesse not to keep him informed of "details."

In sum, as the City's Chief Executive Officer and the man legally responsible for law enforcement in the City, Goode delegated too much, deferred too often, knew too little, and asked too few questions. He testified that he was not in charge of the operation, testimony which, although legally inaccurate, sadly is supported factually by all of the evidence. Goode did not partic ipate in any of the operational planning sessions and told Brooks and Sambor that they need not keep him informed of the details. Sambor briefed Goode on the plan, incorrectly telling him that the Fire Department's squirt hoses would dislodge the bunker. Goode never grasped the significance of failing to remove the bunker, even though he later approved dropping a bomb to remove it.[1] Goode simply did not bother himself with information about

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[1]Goode testified that the significance of the bunker was a
(Footnote Continued)

the nature of the police presence planned for the operation. As a result, he had no real idea how many officers would be involved or what kind of weapons they would be using. According to him, he was surprised by the large number of police at the scene (almost 570 officers); however, he was not surprised when he learned that they had automatic weapons because he "did not have any expectations of those kinds of details." Goode also said that he did not know how many people were inside the house ("As I asked questions, the numbers went from four to five to as many as perhaps fifteen"), and was not aware that MOVE children had crossed a

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(Footnote Continued)
"detail" of which he was not aware:

> Q. [Were you] aware of the fact that as long as the bunker rested on top of the house ... the police felt that they could not safely approach that house in any manner to execute the plan?
>
> A. I was really not aware of those kinds of details. I'm sure that the people in the field, the operational people who were involved understood that. But I was not into those kinds of details.
>
> Q. Did you know that the MOVE members had been firing at the police officers and using the bunker as a shield?
>
> A. Not specifically. I mean if you tell me that that was happening, I believe that was happening. But if you are going to ask me whether someone called me up and said they are using the bunker to fire at police officers, I don't recall anyone telling me that.
>
> Q. Did you understand the urgency of knocking the bunker off?
>
> A. I understood that they felt that they could not safely go onto the roof and into the house from the rooftop with that bunker being there.

police barricade, re-entering Osage Avenue just prior to the confrontation.

Furthermore, Goode claimed he did not know the police planned to use explosives to put holes in the party walls. He said Sambor told him the plan

> called for them to insert tear gas through holes made in the walls through some type of poking of holes through the walls. He may have used the term point charge or something along those lines.
>
> * * *
>
> But no one used the word explosives.

Additionally, Goode testified that Sambor told him police would put tear gas through the roof (as well as the walls). Finally, Goode also kept himself unaware of alternative plans. As a result, the first time he ever heard of the option of proceeding against MOVE by using a crane to remove the bunker was on the afternoon of May 13, 1985.

Goode's detachment from the decision-making process before May 13, 1985 was repeated during the operation itself. Goode was also in Virginia for part of the day on May 12, 1985. He deferred to Brooks' advice that he not join the Managing Director at the Geriatric Center. As a result, he encountered numerous problems in attempting to communicate with Brooks during the day. Similarly, although Goode told Sambor that it was his operation and his call in the end, Goode never spoke with Sambor on May 13, 1985. Finally, he approved the use of the satchel charge but, as

discussed in detail later, told us he was not aware that police planned to drop the charge from a helicopter.

Other top officials were also ill-informed during the planning phase. Brooks had virtually no involvement in the MOVE operation prior to taking charge of it as Managing Director on May 13, 1985. He was out of town from May 8 through May 12, 1985. He did not attend any of the planning meetings and did not know what was discussed there. Indeed, he first learned that the operation was underway on the evening of May 12, 1985, when he heard a news report as he drove back from Virginia that the Osage Avenue neighborhood was being evacuated. Shirley Hamilton, the Mayor's Chief of Staff, had not told Brooks about this when she spoke with him on May 11, 1985. Similarly, Richmond never knew that the City was planning a confrontation until May 11, 1985. No one from the Fire Department was even invited to the May 9, 1985 planning meeting.

Sambor, whose operation it was, appears to have misunderstood critical aspects of the plan. Some of his ignorance appears to be more convenient than real; nonetheless, his testimony leaves the Grand Jury with the impression that he did not fully grasp the situation. For example, Sambor claimed that he hoped that the Fire Department would be able to dislodge the bunker with its squirt guns. Indeed, Goode testified that Sambor told him the Fire Department was going to use water to knock the bunker off the roof. A Fire Department official had categorically stated at

the May 11, 1985 meeting, however, that the squirts were not capable of dislodging the bunker.

Similarly, Sambor's testimony was somewhat ambiguous as to his understanding of the tactical superiority conferred by the bunker and why it was absolutely critical to disable it. Although he said that he realized that it was critical to neutralize the bunker, his other testimony leaves the impression that he did not comprehend that the bunker was the pivotal factor in all planning. For example, Sambor testified:

> I may have had general discussions with [Tursi, Revel and Powell, as they were formulating the plan] and asked them if they were encountering any specific problems or whatever. And I think that the only problem that they encountered was because of the structures on the roof that the ... scenario as developed in 1984 was impractical because of the two structures that were now on the roof.
>
> * * *
>
> Well, at the time [the afternoon of May 13, 1985] we had decided ... and I had approached the subject that the bunker was now a very serious problem ... so that ... some means of eliminating [or] at least neutralizing the bunker had to be considered.

Sambor testified that he did not know the "extent of the structures [bunkers]" and did not find out until May 13, 1985. By contrast, Tursi was of the opinion even in the earliest stages of planning that the bunker's existence was critically important, so much so that when he was told they could not use a crane to remove it, he wanted to abandon any confrontation.

Similarly, Sambor testified (albeit with dubious credibility) that he was unaware of another factor of ultimately critical

importance: the presence of cans marked gasoline on the roof. Numerous witnesses present at the May 9 and 11, 1985 meetings in Sambor's office said that the presence of gas cans on the roof was discussed and, indeed, one of them (a Fire Department official) recalled that Sambor himself talked about the cans and whether they were filled with gasoline or water. Sambor, however, testified:

> If a discussion of gas on the roof occurred at all, and I don't recall any discussion as to gasoline to any degree. The only discussion would have been is that there may be gasoline in the building or whatever, because they did have a generator.

Nonetheless, despite his lack of knowledge, it was Sambor who briefed both the Mayor and the Managing Director on the plan. Moreover, once the original plan had failed, Sambor did not solicit any input from either Tursi or Revel, even though they were two of the three who formulated the plan. (Sambor did ask Powell if he or his men [the Bomb Disposal officers] had any new ideas on the afternoon of May 13, 1985.)

The next two ranking officers in the command structure, Tiers and Kirchner, had virtually no part in the planning prior to May 13, 1985 or the decision-making during that day. Neither Tiers nor Kirchner was able to suggest any plan for May 13, 1985, although Kirchner did propose rushing the house. This lack of input may reflect a lack of experience or training: Tiers was the commanding officer of the Tactical Division but had never been a member of the Stake Out Unit, experience essential for such a command position. Although he was the commanding officer

of the Tactical Division, he did not know what types of explosives the Bomb Disposal Unit was planning to use, and was never part of the discussions regarding the decision to drop the bomb. Finally, Tiers also seemed to think that the squirts could remove the bunker.

Sambor's above-quoted testimony gives the impression that he purposely chose people from the Range (Tursi and Revel) because the commanders (Kirchner and Tiers) were too inexperienced in making plans. Although the MOVE Commission report criticized Sambor for "exclud[ing] from the formulation of the plan the enti police department command structure" (Finding No. 11, p.359), we conclude that such criticism overlooks the inherent inability of at least a significant part of that command structure to make any meaningful contribution. Indeed, it became apparent from the testimony we heard that assignments were made within the Police Department on the basis of rank alone and without regard for whet the officer had any knowledge or expertise in that area. Because we are an investigating grand jury and not a public commission, we have not attempted in this report to recommend comprehensive changes in the internal operations of particular City departments However, the consequences here of assigning personnel without regard for expertise or knowledge compel us to recommend review and revision of this policy. Specifically, we recommend that the Police Department require training or practical experience before assigning officers to technical or specialized command positions

B. The Plan

The plan devised by Powell, Tursi and Revel

The plan devised by the police in 1985 was simply a modification of their 1984 plan. However, one critical factor had changed since 1984: MOVE had constructed two bunkers on the roof of 6221 Osage Avenue. (The front bunker was the larger of the two and is what is meant by references to "the" bunker. From intelligence photographs, Tursi determined that this bunker was constructed from railroad ties, heavy plywood, and metal.) These bunkers afforded MOVE a tactical superiority and made the roof inaccessible to police. From their bunker on the roof of a rowhouse in the middle of the block, MOVE was able to control the street and the alley, thus preventing the police from gaining entrance by the street, the alley or the roof.

Tursi, Powell and Revel devised the 1985 plan. Tursi and Revel provided tactical expertise and Powell provided his knowledge of explosives. Because of the tactical problems posed by the fortified bunker, the 1985 plan centered on injecting tear gas through the party walls of 6221 Osage Avenue, rather than dropping it in through the roof. The 1985 plan provided that, after the neighborhood had been evacuated and the electricity and gas cut off to the 6200 block of Osage Avenue, the police would demand that MOVE surrender to the arrest warrants. If they did not, the police operation would begin. The Fire Department would train water from high-powered squirt guns on the bunker to

frustrate MOVE's ability to aim and fire at police. Simultaneously, police would fire smoke canisters into the street and the back alley to provide cover for two police teams (Insertion Teams A and B) while they entered the two houses on either side of the MOVE compound. (Ultimately, Insertion Team B entered 6217 Osage Avenue, not the uninhabited 6219 Osage Avenue, because police had reason to believe, from surveillance conducted on May 11, 1985, that MOVE had gone into and taken control of 6219 Osage Avenue.) Each insertion team would be comprised of members of the Bomb Disposal Unit and would be accompanied by members of the Stake Out Unit.

Team A, which entered 6223 Osage Avenue, included Bomb Disposal Officers Frank Powell, William Klein and Timothy Laarkamp, and Stake Out Officers Charles Mellor, James Berghaier, Lawrence D'Ulisse and Terrance Mulvihill.

Team B, which entered 6217 Osage Avenue, included Sergeant Edward Connor, a former commanding officer of the Bomb Disposal Unit who was assigned as a patrol sergeant in May, 1985, Bomb Disposal Officers Daniel Angelucci and James Muldowney, and Stake Out Officers Marshall Freer, Alex Draft, Michael Ryan and Sal Marcello.

Once inside the adjoining houses, the plan called for the insertion teams to place shape charges known as "jet tappers" against the party walls of 6223/6221 and 6219/6221 Osage Avenue. Two shape charges would be placed in the party walls of each house, one on the second floor and one in the basement. These charges

would be detonated to blow small, three-inch holes in the walls. (Tursi and Powell rejected the suggestion of an FBI SWAT team agent that they simply drill a hole in the wall, because they feared that a MOVE member could shoot through the wall while the officer was drilling. They also rejected the idea of putting tear gas through the windows because these had been heavily fortified.) The insertion teams would then inject tear gas through these holes into the basement and second floor of the MOVE compound, thereby forcing those inside to exit. A pepper fogger (a portable machine which vaporizes liquid tear gas) would be used to inject the tear gas so as to avoid any danger of fire which could result if exploding tear gas grenades were fired into the compound, and special computations were made to insure that the tear gas would not harm the children.

In addition to the jet tappers, the plan called for the teams to bring "hatch" or wall-breaching charges with them. These charges could be used to facilitate an escape: If the police became trapped in the adjoining houses, they could use the hatch charges to blow holes in the walls of adjoining houses. The remaining wall-breaching charges were to be used to enter the MOVE compound after its occupants had surrendered. Because the police feared that MOVE had booby-trapped the house, they would wait for twelve hours after MOVE's surrender and then, having gained entrance to the MOVE house with the hatch charges, would search the compound. Finally, the insertion teams would bring "flash-bangs," explosive devices which were intended to disorient

MOVE should MOVE come after the police or the police need to advance on MOVE.

The plan also provided for six police posts inside or on top of surrounding houses (two facing the front of the compound, two facing the back, and two rooftop posts) to provide cover for the insertion teams and to provide police with a vantage point from which to determine where MOVE gunfire was originating. See Appendix. It was hoped that, by concealing police officers inside these posts, MOVE would not have any specific, visible targets at which to shoot. In fact, Tursi testified that he never envisioned the gun battle that actually ensued, but instead had anticipated everyone inside the compound surrendering.

Gunfire was to be carefully controlled. No police officer was to return fire unless given specific permission to do so from his Stake Out Unit supervisor, who in turn had to seek permission from Stake Out Lieutenant Dominic Marandola. (Marandola was stationed in Post One, where Sambor spent most of May 13, 1985, and communicated by radio with Stake Out supervisors in the other posts.)

Finally, medical teams would be stationed at either end of the block to provide relief from the effects of the chemical agents and juvenile aid officers were on duty to take custody of the children.

Planning options considered and rejected

Tursi, Powell and Revel considered at least three other possible plans for execution of the warrants: the use of a crane to remove the bunker, thereby destroying MOVE's tactical advantage and enabling police to insert tear gas through the roof of the compound; the use of high-pressured water to remove the bunker; and the use of an armored personnel carrier. These three options each received varying degrees of attention; however, all three ultimately were rejected. Nevertheless, it is worth examining these options and the consideration given them, in part because the plan which was pursued failed almost immediately, and in part because the consideration given these other options further exemplifies the miscommunication, misunderstanding and mishandling of the entire affair.

During the week preceding May 13, 1985, Revel and Powell explored the feasibility of using a crane to remove the bunker. However, the City ultimately rejected the offer of a demolition company to remove the bunker. We heard conflicting testimony as to whether the City rejected the offer because it was too expensive or because it was too risky to the occupants of the MOVE house.

Under immunity, Revel testified that, after the May 2, 1985 meeting, he contacted three demolition companies. Two rejected Revel's proposal based on his description. Richard Geppert, associated with a third demolition company, went to Osage Avenue

and then told Revel that he, too, could not do the job. (Although Geppert did think he possibly could drop a ball straight down through the roof, Revel rejected that idea as too risky.)

Powell testified that subsequently, on Friday, May 10, 1985, Geppert phoned for Revel. Revel was out, so Powell spoke with Geppert, who told him that, for $6,500, he might be able to remove the bunker using a crane by swinging a 2,000-pound ball that would knock the bunker off the roof. Powell relayed Geppert's message to Sambor, leading Sambor to believe that Geppert could guarantee the job. Sambor told Powell he had to go to the Mayor for the money and would get back to Powell. About two hours later, Sambor called Powell and told him the crane option was out because he could not get the money.

Geppert's testimony is mostly corroborative of Revel's account. Geppert testified that, on May 9, 1985, Powell asked him whether he could remove the bunker. After going to Osage Avenue, Geppert told Powell he could remove the bunker for $3,500, if the City would provide armor plating to protect the crane operator. When Powell rejected this option because MOVE was thought to have armor-piercing bullets, Geppert said he possibly could remove the bunker from Pine Street, using an up-and-down (not swinging) motion, for $6,500. Subsequently, on May 10, 1985, Powell spoke with him again and told him that the Mayor had rejected the offer as too expensive.

Finally, Tursi testified that, before May 13, 1985, Powell told him that Geppert had said he could do the job, but that it would cost about $3,500 and the City would not spend the money.

In sum, although the actions of Powell and Revel tend to blur in this testimony, and although there are some discrepancies, Geppert's testimony corroborated that of Powell, Revel and Tursi that, prior to May 13, 1985, Geppert told them that he could do the job but the City rejected his offer as too costly.

Sambor testified, however, that he rejected the idea of using a crane because of the danger to the occupants of the MOVE house of dropping a one-ton ball on the roof of the house. He testified that Powell and Revel investigated the option of removing the bunker with a crane and found that, had it been possible, it would cost between $3,500 and $6,500. However, Sambor explicitly testified that no one ever told him that it was possible, and that, had anyone told him it was feasible, he could have obtained the $6,500 from his finance officer and his administrative officer without going to City Hall or the Mayor for approval. Goode testified that he was never contacted about this offer.

Some of the conflicts in the testimony are perhaps attributable to Sambor's possible misunderstanding of Geppert's proposal. When Sambor was asked before the grand jury whether he would consider dropping a ball onto the bunker "feasible," he replied no, because it could have gone right through the ceiling and the second floor, and endangered anyone on the second and possibly first floors. This method of using a crane (i.e., to drop a ball

on the roof of the house) sounds like that which Revel rejected initially. Geppert testified, however, that he proposed removing the bunker by using an up-and-down motion (which, by implication, suggests the wrecking ball would not be free-falling through the house and thus would pose a danger only to MOVE members electing to remain in the bunker itself). Moreover, the testimony of Revel and Powell referenced above suggests that Geppert called back, having initially suggested dropping a wrecking bail, to propose a less dangerous procedure. For whatever reason, by May 10, 1985, the use of a crane to dismantle the bunker was no longer considered an option by Tursi, Revel and Powell in their planning.

The crane option was nevertheless subsequently re-explored. Brooks testified that after he, Richmond, Licenses and Inspections Commissioner James White, and Health Commissioner Stuart Shapiro went with Sambor to see the fortifications on the afternoon of May 13, 1985, White suggested getting a wrecking company to use a crane and then left to work on the idea. Brooks said that Sambor was present when White mentioned this idea, and that Sambor did not indicate that this possibility already had been investigated and rejected as unworkable. In contrast, Sambor testified that, when the crane option was again suggested on the afternoon of May 13, 1985, he told them that his officers already had explored that option and determined that it was not feasible, and that they (Brooks and White) nonetheless wanted to try again anyway. Ultimately, White did contact a man from Hawthorne (a demolition

company) on May 13, 1985, who concluded that it was not possible to use a crane to remove the bunker.

We, the Grand Jury, are concerned that a possibly viable option was not pursued either because of a misunderstanding as to the proposal or because of an unwillingness to expend funds. There is also evidence to suggest that Police Department personnel apparently improperly generated false information after the fact to excuse their rejection of this option. We have concluded, however, that if false information was generated after the fact, it was done in an attempt to chronicle the gist of efforts which had been made in exploring this option, and not with the intent to obstruct any proceedings. For that reason, we do not recommend any charge, but do believe that the facts with regard thereto warrant public discussion.

Powell testified that he vaguely recalls Sambor calling him after May 13, 1985, and asking him to write a memo saying that the crane had not been feasible. Powell testified that, although the crane option had been workable, he remembers "thinking in depth, should I do it or shouldn't I do it, and I remember saying, well, maybe I will do it, because I didn't want the world to know that we burned down sixty-one houses because they wouldn't give us $6,500. I can remember thinking that, but I cannot remember if I made the memo up or not."

Powell additionally testified that he spoke with Police Inspector Hendell several times, although he could not recall specific interviews. We reviewed a memo of an interview with

Powell by Hendell, dated June 10, 1985, which states that on May 2 and 3, 1985, Powell contacted Robert Thackaray, asked if it was feasible to use a crane to remove the bunker, and was told that the job was too big for his company. No cost was discussed. Powell, however, testified before us that he has never heard of Thackaray and never called him. The memo further states that on May 6 and 7, 1985, Powell contacted Andrew Hawthorne, who also said that he could not do the job. Again, however, Powell testified that he never contacted Hawthorne and never gave anyone that information. Finally, the memo states that on May 8 and 9, 1985, Powell contacted "Paul Geppert" who said that he could not do the job. The memo further states that Powell relayed the information personally to Sambor at a meeting on Saturday, May 11, 1985. Powell testified, however, that this was not true, and that if he were going to falsify information, he would have used Geppert's correct name (Dick, not Paul). Although Powell testified that the paragraph regarding Geppert was not true, he added that it was what Sambor wanted him to say when Sambor asked him to write the memo.

Sambor categorically denied instructing that a false memorandum be prepared. He testified that after May 13, 1985, he ordered the preparation of many reports and may have ordered Powell to prepare a memo regarding the crane. Sambor said, however, that he would not have asked Powell to lie in a report.

Nonetheless, this testimony suggests at best a disregard for accuracy by some Police Department personnel. Although one of

the planners (Revel, not Powell) did contact three construction companies, and although Sambor may have believed that use of a crane was not "feasible," Powell's unequivocal testimony, if credited, shows that the specifics of the memo resulting from his interview with Hendell were fabricated. We do not recommend charges for obstruction of the administration of law or other governmental function under 18 Pa.C.S.A. §5101, however, because it is not clear what testimony is accurate and there is a lack of any evidence of criminal intent.

A second method of disabling the bunker which was considered in the planning stages was the use of high-pressure water. In 1984, police and fire personnel had conducted tests and concluded that they could dislodge the free-standing wooden pallets on the roof of the MOVE compound by using high-power water hoses. The fortified bunker which existed in May, 1985, however, posed a problem of a different magnitude. Tursi, Powell and Revel testified that, as soon as they viewed the bunker, they were certain the bunker could not be dislodged with fire hoses. In their planning, therefore, they used water only as a diversionary tactic, although the idea of using water to dislodge the bunker was not formally rejected until the May 11, 1985 meeting at which Richmond confirmed their initial impressions. (The Fire Department did have a giant deluge gun which may have had sufficient power to remove the bunker, but that piece of equipment was not working in May, 1985, and would not have been useful in any event because

to be effective it would have to be placed where its operator would have been exposed to MOVE's gunfire.)

While the planners (Tursi, Powell and Revel) were certain from the earliest stages of their planning that water could not be used to dislodge the bunker, Sambor seemed confused about the feasibility of this option, just as he was about the use of a crane. Richmond testified that, at the May 11, 1985 meeting, he, Scipione and Miller made clear their doubt concerning the ability of the squirts to dislodge the bunker. Miller testified less equivocally, recalling that Richmond had told Sambor that the squirts would not be able to dislodge the bunker. Scipione testified that:

> [T]hey wanted to know ... whether ... the squirt gun would knock the bunker off of the roof. It was my impression at the meeting that they pretty much felt it would work. The police already had it in their minds that we were going to be able to ... knock this bunker off the roof.
>
> * * *
>
> I thought [it was] very clear to the Commissioner that when we left that meeting, the police understood that the Fire Department could not under any circumstances guarantee that we could knock the bunkers off the roof with the water. I thought that was absolutely clear.... [I]t was very doubtful in my mind that the bunkers would be knocked off the roof. And I think, after we finished that meeting, I can't believe that anybody there really felt that that would happen.

Finally, Revel testified that Richmond and Scipione had agreed at the May 11, 1985, meeting that the squirts could not dislodge the bunker. Nonetheless, Powell testified that while he, Tursi and

Revel were emphatic in their view that the bunker was immovable, "everyone else seemed to think differently." Indeed, Sambor testified that, on May 13, 1985, he thought the Fire Department would be able to dislodge the bunker with its squirt guns, and Mayor Goode testified that Sambor told him the Fire Department was going to use water to knock the bunker off of the roof.

A final option considered was the use of an armored personnel carrier against the MOVE compound. This was considered only briefly and was rejected because police believed that MOVE probably possessed explosives and gasoline which they might use against the carrier, causing serious injury to officers inside.

C. Deficiencies in Planning

Numerous deficiencies in the City's plan resulted not only from the decision-makers' abdication of responsibility discussed above, but also from the City's imprudent haste in developing and executing a plan with artificial deadlines. Although the City waited two years before taking any action against MOVE, it waited only six days from its decision to act until its execution of the massive police operation of May 13, 1985. As previously discussed, the decision to act quickly was made in response to mounting public pressure and growing media attention. Additionally, Sambor said that he chose to act expeditiously because he felt that MOVE would be expecting a confrontation and would be preparing for one. Of course, MOVE had been expecting and preparing for a confrontation

for at least a year, so that the City's haste did not hinder MOVE's readiness, only its own.

The City's rush to meet the self-imposed deadline of May 13, 1985 resulted in its failure to gather more extensive intelligence on MOVE, to consider alternate plans, to adequately train and brief the officers, and to otherwise prepare for what very obviously might be a confrontation costing the lives of children, police and MOVE members. (Of course, some of these deficiencies resulted not only from the haste but also from the inability or unwillingness by City officials and Police Department personnel to seriously think through the plan or contribute to its formulation.) The various deficiencies in the City's preparations and plan are discussed immediately below. Another consequence of the City's hurry to resolve the confrontation once it was initiated -- the dropping of a satchel charge, which had not been tested, after only the briefest of consideration by Goode and his cabinet -- is discussed in Part VII of this report. Finally, a highly debated aspect of the City's needless haste and faulty preparations -- its decision to execute the warrants even though the children were still inside the MOVE compound -- is discussed in Part IV (together with other instances of the City's disregard for the safety of the MOVE children).

Insufficient intelligence to prepare an appropriate plan

The first of many shortcomings in the City's planning process is that the intelligence available to the City in preparing for the confrontation was grossly inadequate. (One officer even suggested that, had there been adequate intelligence, no assault would have been considered.) The police did not know what type of fortifications existed inside the MOVE compound, how many or what types of weapons MOVE possessed, whether MOVE had explosives and, if so, where they were kept, or how many adults and children were inside. Tursi testified "We had no real specifics." He explained that:

> A lot of things we did were based on [MOVE's] past performance, some of the things they did in 1978, and a lot of the little things that went into the plan had to do specifically with the type of arms that they had in 1978, and that [was] the only real intelligence. We had no real specifics. Every time we asked ... how many weapons [MOVE possessed], we would never get real sound, concrete answers. When we asked ... how many people were in the place, we never got, 'Well, they have five adults and three children,' or anything like that. They would just give us guesstimates. And these ... are very important.... [I]t's tough to make intelligent decisions when you have poor intelligence, and ... we just wanted to know what we were going up against when we went in there.

Everyone present on Osage Avenue was surprised by the extent of the MOVE fortifications which were revealed on May 13, 1985. Brooks described the fortifications exposed in the morning assault on May 13, 1985:

> It looked to be about four by four or six by six timbers inside the house, up against the windows on both floors, as well as the boards that were on the outside....
>
> * * *
>
> And the slat [covering the windows] looked to be something like one by fours or one by threes....

Tursi said:

> After the explosion ... [t]he front portion was exposed, and inside of the -- if you would, it looked like a log cabin within a house. It would almost be like taking the front wall down and having another wall inside of that. It was constructed basically of large timber, trees. They looked like trees. I'm not talking little fence posts or anything; I'm talking large trees.

Police planners had no idea that entire tree trunks had been dragged into 6221 Osage Avenue; while some suspected that MOVE had fortified the walls, they did not know how well fortified they were. Revel, Powell and Tursi admittedly had no sense of the magnitude of MOVE's fortifications when they developed the plan.

Benner and Boyd provided what intelligence there was. Powell testified that Benner was constantly updating them as they developed the plan. While Benner had been involved in the Police Department's monitoring of MOVE for several years, he did not actively participate in monitoring MOVE until immediately prior to the confrontation and did not even know of the existence of the front bunker until April 30, 1985.

The task of monitoring MOVE activities on Osage Avenue had been assigned to the Civil Affairs Unit. Officer George Draper

of that Unit, who was at the scene for an unspecified time period every day prior to May 13, 1985, submitted reports on the construction of the bunker, MOVE's acquisition of lumber and tree trunks, and other relevant topics. He testified that no one interviewed him prior to May 13, 1985, however, so as to gain intelligence from him. Further, he was not informed that a police operation to serve arrest warrants was set for May 13, 1985.

Lack of any contingency plans

Although Sambor discussed several possible scenarios at the May 11, 1985 meeting (MOVE would surrender; MOVE would blow up its own house; MOVE would use their children as hostages; MOVE would fight to their deaths), only one plan was presented. Thus, although the plan failed shortly after the operation began, there were no alternative plans. (There was a one-paragraph, unrealistic contingency plan. Powell prepared a typed outline of the plan at Sambor's request, including the paragraph: "If for some reason entrance is not gained through the walls for the gas teams, bomb men will go onto the roof and drop gas down the chimney or blow holes in roof and drop gas onto 6221.") Even had the initial phase of the plan succeeded (i.e., had the insertion teams been able to pump tear gas into 6221), there was no strategy for forcing armed MOVE members out of the bunker if the gas did not happen to waft up into the bunker from the second floor.

Lack of any intermediate plan once shots were fired

There was no plan for reassessing the situation once a gun battle began. (Tursi, the primary planner, testified that he never envisioned any gun battle.)

Lack of any fire-fighting plan

Despite MOVE's threat to burn down the block and despite the City's belief that MOVE possessed both explosives and gasoline, there was no contingency plan for fighting a fire because, as Scipione testified, "we were under the impression that there would be no fire. Our role was to provide diversionary water, ladders and medical services." Indeed, the Fire Department was not even notified of the pending operation until May 10, 1985, was not brought into any planning meetings until May 11, 1985, and was then told only to provide medical services, diversionary water and ladders. Moreover, the Fire Department was never told to prepare to fight a fire during an armed confrontation.

Furthermore, there was no discussion at the May 11, 1985 meeting concerning the possibility of fire if MOVE blew up the compound. (Had that happened, Miller said, the Fire Department simply would have remained in a defensive posture until the police said it was safe to move in.) Similarly, Miller testified that there was no discussion at the May 11, 1985 meeting concerning the danger of fire associated with the City's use of shape charges or the dangers of using shape charges when MOVE was thought to

have explosives. Scipione recalled, however, that Richmond asked whether the shape charges might start a fire but was told that the chance of that happening was negligible. Miller testified that the Fire Department was not prepared to fight any fire at the scene (let alone one in which it was being shot at). If the Department had expected to fight a fire, he said, it would have brought more equipment.

Given MOVE's threats and the City's belief that MOVE possessed explosives and gasoline, the lack of any fire-fighting plan is especially derelict because safety considerations would prevent the Fire Department from fighting in a conventional manner any fire which developed. Richmond testified that the squirts could be used to extinguish a roof fire, but would only exacerbate a fire which had spread to the second floor; such a fire must be fought instead with hand-held lines. Of course, from its rooftop bunker, MOVE could shoot at any fire fighters using hand-held lines on the ground. (In fact, Richmond was fully aware that MOVE had shot five fire fighters in the 1978 confrontation.) Moreover, because MOVE was rumored to have tunnels, it was speculated that MOVE could blow up its own house while escaping to adjoining houses from which it could shoot at fire fighters.

Charles King, a fire consultant who appeared as an expert witness before the grand jury, testified that the Fire Department should have developed a "pre-fire plan." King outlined a "surround and drown procedure," in which the Fire Department would

have placed heavy-caliber fire-fighting equipment across the street from the MOVE compound. This equipment would have been fortified with metal plates, and would not have been manned, but instead would have been operated remotely. Additionally, deluge guns would have been strategically stationed, ready to lessen radiant heat. Finally, squirt guns would be placed at either end of Osage Avenue. In contrast to King's pre-fire plan, however, the City had no plan to fight a fire on May 13, 1985, and did not even have the proper equipment at the scene to do so.

Failure to use trained hostage negotiators

In their testimony before us, Tursi, Powell and Revel made no reference to the possible use of professional hostage negotiators if the operation stalemated. Similarly, Goode, Brooks and Sambor did not indicate in their testimony that the use of professional negotiators was considered in the planning stages. Although professional negotiators were readily available both from within the Stake Out Unit and through the Crisis Intervention Network, a private agency which works under contract with the City, their use was not considered in planning for the operation.

Some efforts at mediation were made immediately prior to the confrontation and also on May 13, 1985 after the initial standoff. Professional mediators from the Crisis Intervention Network attempted to intervene -- on their own initiative, and not at the City's request -- on May 12, 1985. Local elected officials and residents also attempted to mediate. Most of their efforts were

also with the City's acquiescence, not at its instigation. All of these efforts were unsuccessful. Although MOVE's demand on May 13, 1985 was the release of MOVE members imprisoned for the 1978 murder of Officer James Ramp (not merely judicial review of their trials and convictions, which had been exhausted by that time), the City's legal inability to accede to this demand would not have necessarily precluded fruitful mediation. Clearly, the use of hostage negotiators during the stalemate on May 13, 1985 should have been considered.

Lack of any sure means of communication with MOVE during the stand-off on May 13, 1985

None of the witnesses testified that any thought was given to providing MOVE and City officials with a sure means of communication on May 13, 1985. Although MOVE had its bullhorn (with which it had responded to Sambor's demand, via his bullhorn, for their surrender), there apparently was no other means of communication more conducive to negotiation, such as a telephone link between the compound and officials.

Inadequate preparation of the officers assigned to the MOVE confrontation

Officers assigned to effectuate the plan on May 13, 1985, were given inadequate information about the operation and insufficient time to prepare for it. Several officers testified that they were not given any relevant tactical information and were

not even told whether there were children in the house. A Stake Out officer assigned to Post Two testified:

> For myself, I would have preferred to have practiced this operation, to have some extensive idea as to the physical plant, the location, the relative field of fire that we would be placed in, [and] any hazard relative to those fields of fire that we would have become involved in. [I] ... would have liked to have had greater medical support. [I] [w]ould have liked to have known how long we were going to be there, where our relief was coming from, areas of infiltration and exfiltration, a wide range of tactical information, which we were not given. I don't know if anyone possessed that at the time, but the briefing was extremely poor, and essentially, we were placed in a position where we did not know exactly where the [gunfire] would come from; how many people were in the house, what kind of offensive makeup they had in the house.
>
> We were placed in a situation early in the morning, three of us in a position facing the MOVE house where we could receive fire from two fields of fire; that is, the front of the bunker, the side of the bunker and the front of the house, and our only protection was seventeen sand bags for three men. I would have to assume, based on the type of construction that I witnessed subsequent to the event, that the people in the MOVE complex had far greater cover and concealment than we could have had. We were left out on a limb under those conditions, given those seventeen sand bags and told to make the best of a bad situation, which I think we did.
>
> As I said, things as rudimentary as picking our own weapons were left in someone else's hands. And we only knew what we were going to do, where we were going to be and what was going to occur only several hours before the event began, which I thought was extremely poor tactics. The leadership was non-existent, and my overall feeling of that was extremely negative and still is to this day, and will remain that way for the rest of my life.

Another officer, assigned to Insertion Team A, testified similarly concerning the lack of notice and briefing, and added that he and his team members were surprised when the police threw gas canisters in the alley as his team made its way to 6223 Osage Avenue; the team had not known about this and had to stop to put on gas masks.

Not only were police officers given little information about the assault, but they were given little time to prepare for it. Several Stake Out officers told us that they first learned of their assignment to the MOVE operation on Sunday night, May 12, 1985. Officers assigned to the insertion teams were instructed to meet at the Police Academy at 11:00 p.m. on May 12, 1985. (Some of the officers involved had already worked their shift on May 12, 1985.) At that time, Powell demonstrated how to use the hatch charges and the flash-bangs, so that the Stake Out officers could escape if necessary.

In addition to being presented with explosives with which they were not familiar, Stake Out officers were issued special weapons with which they were not familiar. Those officers who had had a few hours of advance notice went to the Range on their own time to practice; the other officers did not. Powell said that he asked Kirchner to give Stake Out officers time to train with the weapons, but Kirchner refused. Powell testified:

> [W]e were trying to get the guys [on Team B] up to train, to function fire the weapons and sight them in, become familiar with them and make sure everything was all right, and Stakeout wouldn't give them the permission to come up.

* * *

> If I recall correctly ... I don't know if it was at [the May 11, 1985 meeting] or not -- [Kirchner] said, "They have other assignments. They know how to fire their weapons. They don't need to be trained. They have other assignments. We can't take them off the street. We can't allot for overtime."

Powell further testified that he thought the Team B officers were out on Osage Avenue all Saturday night and early Sunday morning, and that when they finished there they went to the Police Academy to be briefed and then function-fired their weapons Sunday morning on their own time.

Inappropriate weapons assigned to police officers

Stake Out officers were armed with the standard weapons issued to officers in that unit (i.e., Uzi submachine guns, shotguns, and M-16 automatic rifles). Additionally, police had a variety of other weapons at the scene, including an M-60 machine gun, an anti-tank gun, three Browning automatic rifles (BARs), suppressed .22 caliber rifles, a .50 caliber machine gun, and .357 caliber handguns. Generally, it is a crime under 18 Pa.C.S.A. §908 to possess a silenced weapon. However, the possession of these weapons by the police falls within one of the enumerated exceptions to this statute and, thus, was not a facial violation of the statute to be considered by us.

We note, however, that possession by the police of some of these weapons was, at the least, inappropriate. The acquisition

of heavy weapons not in the standard police armory, such as the M-60's and BARs, was explicitly (but unnecessarily) approved by Sambor. Powell was critical of the use of .50 caliber machine guns because the rounds would over-penetrate. Marandola, a lieutenant in the Stake Out Unit, was critical of the use of any special weapons. He told us that he viewed the MOVE problem as a barricade situation, and thought that the standard-issue weapons used by the Stake Out Unit in the fifty to sixty barricade situations it handles each year were adequate.

The Police Department evidently chose this arsenal because it expected MOVE to have an impressive arsenal. In the aftermath of May 13, 1985, police found only two shotguns, a .22 caliber rifle and two .38 caliber revolvers in the MOVE compound debris. The prior 1978 MOVE arsenal had included semi-automatic weapons, and MOVE had boasted in May, 1985, that they had better weapons than they had in 1978. (Indeed, the police thought that MOVE had armor-piercing bullets in 1985.) The physical evidence, however, suggests that their 1985 arsenal was less impressive than their earlier cache.

Insufficient provision for the safety of police and fire personnel

There was no first-aid equipment in the Posts, so that if anyone were shot or otherwise injured, he would have to be carried to Cobbs Creek Parkway to receive medical attention. There were not enough flak jackets or other protective vests for all of the

personnel involved. (One of the two officers hit by MOVE gunfire on May 13, 1985 was protected from serious injury because the bullet lodged in the protective vest under his shirt.) There were insufficient sandbags for the Posts.

Insufficient relief for police officers

The City's ill-planning went beyond insufficient provision for training and preparing the officers assigned to the confrontation. There was also insufficient provision made on May 13, 1985 for their relief at the scene. The initial plan was to have half of the Stake Out Unit work from midnight until noon, May 13, 1985, and the other half work from noon until midnight. This schedule could continue indefinitely until the operation was completed. On the morning of May 13, 1985, however, the members of the second half of the unit were called to the scene earlier, so that by noon, May 13, 1985, the entire Stake Out Unit was on Osage Avenue and remained there for the rest of the day. (This was done with the knowledge of Sambor and Tiers.) Individual Stake Out officers would relieve other officers, so that they were given what amounted to coffee breaks. No one went home, however, and supervisors in the Posts and their radio men were not relieved at all.

At 5:00 p.m. on May 13, 1985, Sambor told Kirchner that they were going to have to start relieving men; otherwise, there would be no officers available at midnight. Kirchner told a subordinate to begin ordering certain officers to leave and others to

stay. Very shortly thereafter, however, police dropped the satchel charge, with the result that ultimately no Stake Out officers left the scene. Moreover, Kirchner ordered the officers in Four Squad -- who had begun work at midnight, May 13, 1985, and many of whom were assigned to Post Two -- to remain at the scene until 7:00 a.m., May 14, 1985. Kirchner acknowledged that these men had reported to work at midnight, had been involved in a gun battle that morning and had been in the Posts virtually all day, but said he discussed the decision with that squad's sergeant, who felt his officers had rested sufficiently to remain there. Marandola did not want to send anyone home. Significantly, Klein (who, like the Stake Out officers, had been on the scene all day) testified that he was mentally and physically exhausted when he constructed the bomb.

Insufficient care in the selection of police personnel

Insufficient care was exercised in selecting officers for the police operation. Blackwell suggested to Goode that no officers involved in the 1978 confrontation be involved again in 1985, and Goode agreed. Nonetheless, a few officers in fact were involved. Indeed, one member of Insertion Team A had been criminally charged with assaulting Delbert Africa during the August, 1978 confrontation. That officer was acquitted at a trial for the assault on Africa, however, and there is no evidence that he acted in any way improperly in the 1985 operation. Nonetheless,

these officers should have been excluded from the operation pursuant to Goode's directive.

Inadequate communication system

Provision for communication among City officials on May 13, 1985 was extraordinarily poor and was, in fact, a critical factor contributing to the conflagration that resulted that day. (See Part VIII.) Goode's decision not to be at the Geriatric Center, and the particular communication system in use that day, prevented Goode, Brooks, Sambor and Richmond from communicating quickly and easily with one another.

Acting on Brooks' advice, Goode stayed in his City Hall office on May 13, 1985, rather than coming to the Geriatric Center where Brooks and numerous Commissioners were. Ostensibly, Brooks and Goode would remain in telephone contact, while Brooks and Sambor would remain in radio contact. (Brooks and Goode also had M-band radios.) Of course, Brooks and Sambor did not remain in either the Geriatric Center or Post One throughout the day, and so were not always near a phone or a two-way radio. Predictable problems resulted. For example, Brooks testified that he tried for a long time, but without success, to reach Sambor on the radio when he could not see any water on the fire which resulted from the satchel charge. Similarly, the police officer assigned to assist Goode said he had problems reaching Brooks, and guessed that possibly Brooks could not return his call because he was not near a phone.

Communication between the Police and Fire Departments was also very poorly coordinated. Although Fire Department personnel were equipped with two-way radios, theirs were incompatible with police two-way radios. Additionally, although it was understood that this was a police operation and that Sambor was in charge, there was no specific Police Department liaison with whom Richmond was to have contact. Similarly, Tiers, a high-ranking police commander, said that, to his knowledge, no one had the specific responsibility of acting as a liaison with the Fire Department (specifically, the squirt operators). Predictable scenarios resulted: When Richmond radioed Scipione, asking him to check with the police to see whether the Fire Department could turn the squirts on the fire which resulted from the satchel charge, Scipione radioed back "Who's in charge of the police?" Richmond responded that he did not know. Scipione then tried to find someone he recognized as a police officer in charge.

Rather than having designated liaisons between the Police and Fire Departments, pursuant to standard procedure <u>any</u> police officer could direct a fire fighter, even if the fire fighter were of higher rank. A police officer could tell a fire fighter to shut off the squirts, and the fire fighter would comply and then inform the Fire Department command structure of his (the fire fighter's) action. If a fire fighter received an order from any police officer, Miller would ascertain whether the Commissioner or Deputy Commissioner knew of it, in accordance with the chain of command established at Osage Avenue by Richmond. When the

squirts went on or off without his knowledge, Miller just assumed that Richmond had given the orders if Miller had not.

Finally, the participants there that day did not communicate with each other. Sambor never notified Brooks of his and Richmond's decision to let the fire burn. (See Part VIII.) Similarly, Marandola said that no one in Post One, including Sambor, understood the morning explosion of police charges inside 6219 (see Part VI) -- it was not part of the plan and no prior approval was sought for it.

Failure to test explosives before using them against the MOVE compound

Neither the satchel charge nor the C-4 charges used in the morning against the party walls were tested before being used in 1985. The shape charges were tested for effectiveness and safety in both 1984 and 1985. Because the charges tested in 1985 succeeded in blowing holes three-quarters of the way through simulated cinderblock party walls, the Insertion Teams planned to use a sledgehammer and pipe to complete the hole. Later, police learned that the actual party wall was composed of brick and plaster, not cinderblocks. The shape charges, however, were not again tested against a wall composed of these materials.

Miscellaneous problems in execution of the plan possibly attributable to haste

Police encountered several problems in executing the plan which may have been attributable to the City's haste. For example, the plan called for the disconnection of electricity provided to Osage Avenue before the operation began. Ultimately, however, the electricity was shut off everywhere but to the MOVE compound and the adjoining houses which the police were attempting to enter surreptitiously. This endangered police not only at the beginning of the operation, but also at its conclusion. Tursi testified that in the evening, as he stood waist-deep in water in the alley when MOVE was coming out, he heard a burning transformer crackling overhead and worried that they might all be electrocuted if the live wires fell into the water.

In the City's haste, the plan was never practiced, and unanticipated problems occurred when the plan was executed. For example, because the squirts had insufficient water pressure, the insertion teams were soaked by the initial use of the squirt guns. The water caused Klein's second hatch charge to malfunction.

In sum, the City's planning for the confrontation was, in practically every significant regard, deficient if not abysmal. Thus, the debacle which followed, while not predicted, was certainly predictable.

IV. LEGAL RAMIFICATIONS OF THE CHILDREN'S PRESENCE

Although they repeatedly expressed their concern for MOVE children, City officials ultimately made little effort to assure the children's safety. Virtually no attempt was made to remove the children before May 13, 1985, and when the minimal efforts which were made proved unsuccessful, City officials did not even bother to consider delaying the police operation.

This chapter first reviews the various efforts made by the City to secure the children's safety. It then analyzes the legal ramifications of the City's decision to proceed with the operation while the children were yet inside. The degree of force used by the City on May 13, 1985 is discussed in later chapters.

Late in the afternoon of May 9, 1985 -- several days after Goode had directed Sambor to prepare a plan for executing the warrants -- Sambor asked Deputy City Solicitor Ralph Teti, with whom he was then concluding a meeting on other matters, whether police officers could legally remove the children before May 13, 1985. Teti testified that he returned to his office and researched the question, and then informed both Sambor and Captain Neil Shanahan that evening (May 9, 1985) that they could lawfully take the children into custody and ought to do so if possible. Sambor disputed this and testified that he was not informed that it was lawful to remove the children until Friday afternoon or evening, May 10, 1985.

Then City Solicitor Barbara Mather testified that she spoke with Sambor on May 10, 1985, and reminded him that he lawfully could pick up the children. She testified that she did not recall any response by Sambor, and that Sambor did not seem to understand. She further testified that, either that day or the next, Sambor said he did not expect to see the MOVE children loose any longer (previously, they had regularly been taken to Cobbs Creek Park), because MOVE was aware that the City was getting ready to take action and so probably would keep the children inside the house.

Although removal of the children was treated almost as an afterthought in the planning in 1985, the 1984 plan had provided specifically for the removal of the children by police pursuant to lawfully obtained court orders. Indeed, because then District Attorney Rendell testified that he thought Mather had indicated in August, 1984, that the City could obtain court orders to seize the children, Sambor's request for Teti's advice (and the research pursuant to that request) should not have been necessary.

The lack of concern by City officials for the children is further demonstrated by the fact that, after the City's tardy and duplicative research convinced officials that they could lawfully remove the children, almost no efforts were made to do so. Perhaps the most damning evidence of the City's half-hearted commitment to the children's welfare is found in the instructions given to Officer George Draper, the officer assigned to Osage Avenue on a daily basis. Draper testified that he received orders to remove

the children in the form of a lieutenant instructing him at roll call on May 11 or 12, 1985: "And if you can pick up the MOVE children without any problems away from the house, try to pick them up." Draper was not told the timing of the May 13, 1985 confrontation. Had he been told, he doubtless would have tried harder to take the children into custody and would have requested additional police support to maintain control in the event that some children could have been removed. Moreover, Draper understood the order to pick up the children as subservient to the City's policy of non-confrontation, and did not understand that he was to pick up any MOVE children (not merely those normally living at 6221 Osage Avenue). As a result, on May 11, 1985, he permitted a car with MOVE children to pass a police barricade and enter the Osage compound because he did not want to risk a confrontation and did not know whether the MOVE children in the car usually lived on Osage Avenue or on Pentridge Street.

That City officials made virtually no attempt to remove the children was simply the first failing by those responsible. Later events make plain that none of the City officials made the safety of the children an overriding issue, let alone the foremost objective. After it became apparent to administration officials that the children had not been removed, they never discussed whether to postpone or cancel the operation. Rather, having arrived at a specific strategy, they rigidly proceeded although many involved in the planning anticipated a violent confrontation. Thus, with but a slight hesitation for the safety of the children, City

officials proceeded inexorably to meet the May 13, 1985 deadline which had been arbitrarily imposed.

Goode attempted to defend his decision not to instruct Sambor to delay the operation by stating that, "I was given and approved a plan that indicated to me that as in 1978, that we could safely remove the persons from the house without causing harm to them." When asked, however, how he could cling to the position that the plan could be executed safely without injury to the children, while also admitting that a gun battle was possible, the Mayor stated that the police would only fire at "certain targets." That response led to the following questions and answers:

> Q. And you certainly took into account the fact that police officers, like anyone else, can miss ... and they can strike other targets or individuals; is that correct?
>
> A. I am not a professional police officer.... I frankly never thought about the fact that police officers could miss. I was dealing with a professional Police Commissioner who had thirty years of experience who was saying to me, 'Mr. Mayor, here is a plan that can do what you want it to do.'
>
> * * *
>
> Q. And to break it down a little bit more, assuming the police acted exactly in the manner you understood they were going to act, which is to say have the safest plan possible, that once MOVE reacted by firing their weapons at the police, because the police were going to fire at sure targets, you felt that the risk of injury to the children during that type of gun battle was not great?
>
> A. That is correct.

Sambor admitted that there was no good reason not to delay:

Q. But you would agree that there was nothing, nothing that absolutely would have prevented you from waiting another week or two weeks?

A. No, Sir.

Nonetheless, delay was not discussed.

Nor was there any discussion among City officials concerning the use of force in executing warrants where hostages are involved. The need to discuss this subject should have been clear. One of Sambor's scenarios envisioned MOVE's use of the children as hostages. Goode himself admitted that several people had told him MOVE was likely to use their children as shields, as they had indeed done in 1978.

Moreover, once the operation was set in motion, no effort whatsoever was made to inform police officers that there were children inside the house. While Revel testified to the extensive research he undertook in order to be certain that the amount of tear gas used would not harm the children, many officers (including "Bomb Squad" and Stake Out officers who were using deadly force against the MOVE compound) did not even know that there were children inside. One Stake Out officer said that he did not learn of the children's presence until he saw Michael Moses Ward ("Birdie") in the alley on the evening of May 13, 1985. Klein was not aware that there were children in the house until he heard their voices during the noon lull on May 13, 1985. He said someone had mentioned that morning that the children had been taken into custody. Fire Commissioner Richmond was never told whether or not the children were picked up.

Because knowledge that there were children in the house might have affected the care used by officers detonating explosives and providing suppressive fire, the failure to specifically inform officers of the children's presence was especially derelict. We note that the City officials who were responsible for the decision to execute the warrants on May 13, 1985, but who chose not to wait, repeatedly expressed to us their concerns about the safety of the children. The fact remains, however, that they also repeatedly failed to take measures to protect the children's lives.

Given this failure, we have considered whether the decision to serve the arrest warrants notwithstanding the presence of an undetermined number of children in the house constituted a crime. After careful consideration of the law and the evidence presented, we conclude that no criminal charges can lie.

Only one criminal statute arguably addresses the decision to proceed despite the children's presence, that of reckless endangerment, set forth at 18 Pa.C.S.A. §2705. That section provides:

> Recklessly Endangering Another Person.
> A person commits a misdemeanor of the second degree if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury.

To convict someone of this crime, however, it must be proved beyond a reasonable doubt that the individual acted "recklessly," as that term is statutorily defined. This requires proof that the individual acted with a conscious disregard of a substantial and unjustifiable risk given the circumstances known to him. Here, the risk in question was that the children in the MOVE

house would unlawfully be placed in danger of death or serious bodily injury when the warrants were served. In analyzing whether the risk posed by going forward with the plan was "substantial," we find it relevant that the water and tear gas plan, as tested, formulated and approved, was likely to be safe. Under these circumstances, those who approved the plan cannot be charged for what ultimately occurred. While the City's decision to proceed demonstrated shallow reasoning and poor judgment because unforeseen events might make the plan unworkable, the risk of harm to the children posed by the plan was not so significant as to mandate criminal liability.

In deciding whether the risk in going forward was justifiable, we have specifically considered 18 Pa.C.S.A. §508, Use of Force in Law Enforcement, and §503, Justification Generally. Section 508 permits the use of any force that an officer believes to be necessary to effectuate an arrest or to defend himself. Further, the officer need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. Section 508 specifically allows the use of deadly force in the following limited circumstances:

> [a police officer] is justified in using deadly force only when he believes that such force is necessary to prevent death or serious bodily injury to himself or such other person, or when he believes both that:
>
> (i) such force is necessary to prevent the arrest from being defeated by resistance or escape; and
>
> (ii) the person to be arrested has committed or attempted a forcible

> felony or is attempting to escape and possesses a deadly weapon, or otherwise indicates that he will endanger human life or inflict serious bodily injury unless arrested without delay.

Thus, under the circumstances which here existed, §508 authorized the decision to execute the warrants and insulated the police from criminal liability.

Moreover, §503 provides police a defense under the justification statute. Under that section, conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable if, among other restrictions, the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense. To claim this justification, however, the officer cannot have been reckless or negligent in bringing about the situation requiring the use of force. Here, there was no such recklessness or negligence in the strategy adopted by the police which would render §503 inapplicable. Further, an officer's belief as to the necessity for using force must be reasonable, and not one that he is reckless or negligent in holding, and the force used also must be reasonable under the circumstances. We find that those statutory requirements were met. Thus, the defense set forth in §503 here justified the decision to proceed.

It is significant that the original version of the justification statute considered by the Pennsylvania legislature included a requirement that deadly force could not be used unless the police officer believed that the force created no substantial risk of

injury to innocent persons. The legislature, however, chose not to include this provision in the justification section which it enacted in §508. Under the law, the legislature's failure to enact this requirement creates a presumption that the legislature did not intend this consideration to defeat application of the justification statute when the other elements were met.

On May 13, 1985, law enforcement officials had valid warrants to enter 6221 Osage Avenue and effect the arrest of persons therein. Their attempt to serve the warrants was met with MOVE gunfire. We consider at length in Part VI the events of the morning of May 13th and explain why it is our conclusion that the force then employed in response was not excessive under all of the circumstances. Our only inquiry here is whether those who approved going forward without removing the children were reckless in doing so, that is, whether they consciously disregarded a substantial and unjustifiable risk that matters would develop as they did. The plan which police had developed reasonably and rationally sought to safeguard the children. The effort to force MOVE out with tear gas and water cannot be considered reckless. Moreover, even if the decision to proceed with the plan despite the presence of children could be considered criminal, the statutes discussed above justify that conduct. Thus, no criminal prosecution lies against any official for the decision to proceed to serve the warrants while the children were in the house.

It remains to be said that it was not for us to consider whether any of the individuals involved would be liable in a civil action for negligence, assault and battery, wrongful death or any violation of constitutional rights. Some of these concepts were discussed by the MOVE Commission, but those determinations are not relevant in deciding whether crimes have been committed.

Nevertheless, it is significant that the police did not adhere to their own internal guidelines in their planning. Police Directives Nos. 10 and 111 explicitly provide limitations on the use of deadly force and specify procedures to be followed when hostages are involved. The limitations set forth are more restrictive than the statutes that proscribe justifiable use of force by the police. Hence, violation of any portion(s) of these directives does not constitute a criminal offense, or defeat application of the justification provisions of the Crimes Code. The failure of the police to follow their own directives is, however, a matter warranting our consideration and review because of the consequences to the children. It is likewise a matter for the Department's internal review.

We are compelled to note at least that had the procedures set forth in Directives 10 and 111 been followed, it is almost certain that fewer lives would have been lost. One of the key policies of Directive No. 111 is that "[t]ime is of no importance in removing [a hostage or barricaded person] unless there is immediate danger to human life." Another provision mandates that the commanding officer "[d]esignate a specific individual by name,

preferably one trained in 'Hostage Negotiations,' who will be the only negotiator with the barricaded person." Neither of these policies were adhered to on May 13, 1985.

Admittedly, once the MOVE organization became aware of the City's decision to serve the warrants, they did not permit their children to leave the house for any reason. If the children could not have been picked up pursuant to the court order, however, at the very least, efforts should have been made prior to any confrontation to negotiate the children's placement with MOVE members living elsewhere. Other steps to follow the letter, if not the spirit, of the directives should have been considered.

The failure of the Police Department's leadership to follow or implement its own directives, of course, is irrelevant to the issue of criminal liability. As the directives do not have the force of law, they are not determinative of whether any individual should be criminally charged for the decision to proceed with the children inside the house.

In sum, while we find that the failure to remove the children before the confrontation was morally irresponsible and deplorable, no criminal charges are warranted.

V. SOME TANGENTIAL LEGAL MATTERS

Certain legal matters tangential to our investigation warrant brief discussion before we consider the events of May 13, 1985 and its aftermath.

The first significant matter relates to the legal concept of "taint," a doctrine governing the admissibility of certain evidence in criminal proceedings. We have been instructed on the case law which holds that statements made by any public employee, pursuant to a threat of dismissal from employment, are coerced and therefore cannot be used in any way in subsequent criminal proceedings against that employee. Under the law, the prohibition against the use of such compelled testimony and its fruits is broad. If, for example, a statement is found by a court to have been coerced, then, in order to proceed against the speaker, the prosecution must meet the nearly insurmountable burden of proving that nothing which followed in its investigation -- including even the fact that the person who gave the statement became the target of the investigation -- flowed from that statement.

Since no criminal charges are to be brought, the Commonwealth will not be required to litigate the question of whether the prosecution of any of the participants is effectively precluded because of "taint" flowing from allegedly coerced statements. It appears to us, however, that, had charges been brought, taint could have presented problems of varying degrees with respect to all persons involved in the incident, except the Mayor. Some specifics follow.

Shortly after the confrontation, homicide detectives took statements from many officers who had been at the scene. Some of these interviews were preceded by a notification that the officer was required to give a statement. At about this same time, Sambor issued the first of two orders to the Police Department directing full cooperation with the investigation then in progress. A second order to this effect was subsequently issued in July, 1985. Further, City attorneys representing the Police Department advised Police Department supervisors to direct their subordinates to cooperate with the initial homicide unit investigation.

Not one of these pre-interview directives, orders or introductory statements explicitly threatened dismissal in the event of non-cooperation or mentioned City Charter §10-110, which states that any City officer or employee who refuses to appear or to testify before any court or authorized body shall forfeit his office or position. It might nevertheless have been argued, however, that a coercive atmosphere existed rendering involuntary and inadmissible the statements given by the police officers. Indeed, at least one officer who appeared before the MOVE Commission publicly stated that he so appeared, without invoking any privilege, because of threats that he would be fired if he exercised his constitutional right to remain silent.

Later events might also have been cited to support a conclusion of "taint" as to not only the police but also others involved in the incident. For example, on June 19, 1985, the

Mayor issued an Executive Order pledging or directing cooperation with the MOVE Commission. In pertinent part, that order stated:

> All employees within the Executive and Administrative branch of City government are hereby directed to fully cooperate with the Commission by promptly producing documents, records, files and any other information that the Commission may request. In addition, these employees, on request of the Commission, shall be available to meet with, be interviewed by, and testify before the Commission during its hearings.

This directive's strong language could serve as at least the basis for a defense claim of coercion even in the absence of an explicit threat of dismissal or an explicit reference to the pertinent City Charter provision.

If criminal charges were being brought, numerous other events would doubtlessly be cited and arguments asserted by defense attorneys in support of the conclusion that legal "taint" precluded prosecution of their clients. This possibility is not mentioned by way of explanation with respect to the lack of charges, but rather to illustrate the foolishness of permitting a grand jury investigation to be preceded by an official public inquiry such as that which was here undertaken by the MOVE Commission. Were charges warranted in our view, they would have been brought by us and any allegations of taint would have been dealt with in the proper legal forum.

One additional legal matter should also be briefly noted. A 1973 change in the law of this Commonwealth has precluded a possible theory of liability on the part of the Mayor and other high

City officials. We raise this matter to permit consideration of whether a legislative change is warranted.

Specifically, we have considered whether the Mayor's initial failure to act, and his subsequent imprudent acts, might possibly rise to the level of misfeasance, malfeasance or nonfeasance. These three common-law criminal offenses involve either the breach of a positive statutory duty by a public official, or the performance by a public official of a discretionary act with an improper or corrupt motive. Under present statutes, however, they can no longer be prosecuted as crimes.

Were these still crimes, we would have been able to consider whether one or more of these charges might be warranted. In that event, it could prove significant that, under the Home Rule Charter, the Mayor is "responsible for ... law enforcement within [the City's] boundaries" (Article IV, Chapter 1, §4-100). Thus, in his handling of MOVE, it could be argued that Mayor Goode breached his duty of responsibility for law enforcement in the City. In contrast, of course, it could be argued that his various decisions were proper discretionary acts. If that were the case, criminal liability would only attach if an improper or corrupt motive could be established.

Resolution and consideration of any or all of the issues raised by the offenses of misfeasance, malfeasance and nonfeasance is unnecessary since the Crimes Code explicitly abolished all common-law crimes (18 Pa.C.S.A. §107(b)). The legislature, however, may wish now to consider the codification and resurrection

of these crimes in order to insure the greater future accountability of City officials. We recommend that they do.

VI. THE MORNING OF MAY 13, 1985

Execution of the planned confrontation with MOVE actually began the day before. By the morning of May 13th, the Police Department had assembled hundreds of weapons and various kinds of explosives to assault the compound. In the first few hours of the battle between MOVE and the police, thousands of rounds of ammunition were fired and high-powered explosives were detonated. This section reviews the events of the morning, including the preparations for the assault, and discusses the propriety of the force used.

Many of the police and firemen involved in the May 13, 1985 operation were required to report for duty hours in advance of Sambor's early morning ultimatum to MOVE members. As a result, many of the men in the most demanding situations as the operation progressed had the smallest reserve of physical resources on which to draw.

Lieutenant Dominic Marandola's situation is illustrative. Marandola was ultimately responsible for controlling the police return gunfire during the morning gun battle. He had reported for duty at Stake Out Headquarters sometime between 9:30 and 10:00 p.m. on Sunday evening, May 12th. From there he proceeded to the Geriatric Center at about midnight. At that location he first met with Sambor, Captain Kirchner, Lieutenant Powell and Sergeant Connor, among others. Next, he attended a large meeting

with all command personnel who would be present on the scene. He then waited for the operation to begin.

Like Marandola, the vast majority, if not all, of the Police Department command personnel and supervisors were on duty long before the operation actually began. Sergeant Donald Griffiths, for example, was required to report to Stake Out Headquarters at 10:00 p.m. on Sunday evening. There he met Marandola, Kirchner and Inspector Tiers, and was briefed for the first time about his role in the operation. Similarly, Officer John LaCon, a Stake Out officer who manned one of the surrounding posts the next day, reported for duty before 11:00 p.m. The information disseminated at the briefing which he attended after reporting was vague concerning who was in the MOVE house; he was told, however, to expect "anything" during the confrontation.

Similar instructions were given to the men assigned to the insertion teams. Team members reported for duty as early as 10:00 p.m. on Sunday evening. Before proceeding to the operations area at about 2:00 a.m., they participated in briefings and witnessed a demonstration of the "flash-bang" explosives they would use to disorient MOVE combatants.

As a consequence of the reporting demands and the decision not to brief key police personnel earlier, many men were on duty for nearly eight hours before the operation even began. Moreover, many officers had been on duty for almost 24 hours -- and without sleep for many hours more -- when they were confronted with the back alley inferno. Better planning and organization could have

avoided such extreme mental and physical demands on participating officers.

The specifics of the plan which police sought to implement on the morning of May 13th have already been extensively discussed in Part III of this report. In brief summary, if MOVE declined to permit peaceful service of the arrest and search warrants which had been obtained, the first step was to activate the Fire Department's squirt hoses. Their purpose was to direct water onto the compound's roof to minimize or eliminate the bunker's strategic advantage. At the same time, the two insertion teams would proceed, under cover of smoke and tear gas, into the two properties adjoining the MOVE compound, 6219 and 6223 Osage Avenue. Once inside these houses, the teams were to make three-inch holes in the basement and second floor party walls. Through these holes tear gas would be inserted into 6221 using pepper foggers. This insertion of gas into 6221's lowest and highest floors was intended to first drive its occupants to the first floor and then cause their surrender.

In early May, 1985, this Police Department plan was reviewed by FBI Agents Scalf, Macys and Harrison. According to Scalf, the plan seemed a workable solution to them. Scalf did not recall any concern about the plan generally; neither did he recall any concern by Macys or Harrison about the intended use of explosives to breach the party walls.

To insure the plan's success, six police posts were set up close to the MOVE compound. These were intended to serve both as

observation points and as positions from which any necessary police fire cover could be provided. In four of these locations -- 6218 Osage, 6232 Osage, 6218 Pine, and 6228 Pine -- armed police officers were stationed on the first and second floors overlooking 6221's front and rear. Two additional rooftop posts were set up and manned at 430 and 432 62nd Street and 6248 and 6250 Osage Avenue.

Earlier portions of this report have discussed in detail the various weapons which were available to the police on May 13th. The arsenal -- much of which was distributed to the six surrounding posts -- included suppressed rifles, M-16's with and without scopes, M-60 machine guns, Browning automatic rifles, Uzis, shotguns, service revolvers, a .50 caliber machine gun, and a .50 caliber scope rifle. Sambor had approved the acquisition of any weapons which could be legally obtained. He explained that he wanted the police to have automatic weapons so that they would have weapons equal or superior to those possessed by MOVE. Marandola, however, told us that he had reservations about Stake Out's possession of special weapons with which they had no familiarity. Griffiths told us that he ordered the removal of the .50 caliber weapon assigned to his post. He did so because the weapon was, in his view, too big and too dangerous.

Although the police were more than adequately provided with special weapons, the command personnel were not so diligent in providing other protective equipment. Marandola told us about the difficulties of dividing the one hundred available sandbags

among the posts and positions where they were needed. There was a plainly inadequate number of sandbags. One officer expressed to us his concern that, in his location, there were only seventeen bags available to protect three men. His problem, however, was far less severe than that faced by the seven men in Post Four who had only twenty sandbags to protect them.

Insertion team members were provided with "protective body armor" (as opposed to "flak jackets") to be worn under their shirts. This equipment saved Connor from serious injury when, while inside 6217, he was shot in the back by a MOVE member during the morning gun battle. Similar protective life vests were not provided to any Fire Department personnel, however. Deputy Fire Chief Walter Miller told us that eight such vests were initially committed for the use of fire fighters who would be in exposed positions during the morning, but that the Police Department later reneged on that promise.

The police operation actually began at daybreak; by then all units and men were in their assigned positions. The Police Commissioner, using an amplification system from inside Post One at 6218 Osage Avenue, advised MOVE of the outstanding warrants and allowed them fifteen minutes to surrender. MOVE did not cooperatively respond. Rather, as LaCon described it, MOVE answered with a string of obscenities and threats:

> they told us all that they hoped our insurance was paid up, that we contacted our wives and families because we wouldn't be coming home, if we came in that house, they had something

> for us. Another voice got on slightly thereafter and told us that we weren't going to leave the street alive, remember 1978, that we were going to die out there.

A voice on MOVE's loudspeaker also yelled:

> You're going to be laying in the street, bleeding in the street. Come on in and get us. We're going to kill you where you stay, where you lay. We see you on the roof. We know you're in those houses.

When the fifteen minute waiting period expired, the plan moved forward. Berghaier was outfitted typically. A gas mask and ear plugs had been supplied. At Powell's suggestion he had Vaseline applied to his face to protect his skin. To prevent gas from seeping under his clothes, he had also taped down his sleeves with duct tape and obtained blousing rubbers for his pants' cuffs.

Although the initial plan called for Team B to enter 6219, by May 13th that strategy had changed as police believed that MOVE had broken into and gained control of 6219. The revised plan directed Team B to enter 6217 and infiltrate 6219 by knocking a hole through the front porch party wall.

Failures in coordination and equipment began even before the insertion teams reached their assigned destinations. As Team B approached 6217 by moving from house to house up Osage Avenue, an improperly directed squirt gun drenched the officers with a steady stream of water. Posts One and Two delivered smoke and tear gas canisters to the front of 6221 to cover Team B's movements. The men manning the posts faced difficulties in providing this support, however, because many of the canisters supplied were so old that they did not function. The situation was described this way:

> We would take a shell and bang it on the ground and then shake it until it sounded like a salt shaker. Then we had some idea the shell would fire.

Team A moved to their objective -- 6223 -- through the back alley. Posts Three and Four provided smoke and tear gas cover with their aged canisters. Unfortunately, Team A had not been told that smoke and tear gas would arrive. Halfway up the alley, while exposed to fire from the rear MOVE bunker, the officers in Team A had to stop and put their gas masks on.

Despite the difficulties which the teams faced, both 6217 and 6223 were successfully entered. At or near the time that these entries were accomplished, gunfire broke out. Without question, this initial gunfire emanated from the MOVE compound. Muzzle flashes from the front bunker were seen by many witnesses. Similar muzzle flashes from the rear of 6221 were seen by other witnesses. Marandola also saw a weapon protrude from the base of the bunker and fire at Post Five. At the same time, the Post Five supervisor reported that they were being fired on.

The testimony of the people who saw muzzle flashes was confirmed by other witnesses who testified, without qualification, that they heard the first shots come from the MOVE compound. Other evidence was presented concerning the kinds of weapons which MOVE was then using. Officer Michael Tursi believed that a 12 gauge shotgun was responsible for the first shot and thereafter heard what he believed was .22 caliber gunfire. Sergeant Albert Revel and LaCon similarly told us that the first shot sounded like a shotgun blast, followed by one or more .22 shots. Although

well aware that no automatic weapons were ultimately recovered from the premises, LaCon was convinced, based on the muzzle flashes which he saw from the bunker, that MOVE also fired an automatic weapon.

The police response to MOVE was measured and deliberate. The police plan allowed only a controlled discharge of firearms. Unless in direct danger, no officer was permitted to fire without relaying information about his situation to Marandola through the Stake Out supervisor located in each post. Orders to shoot were given by Marandola in Post One; the majority of the orders to fire during the day were given by Marandola through the respective post commanders.

At least four or five different police positions took direct gunfire before permission to return fire was given. Kirchner estimated that forty or fifty shots were fired by MOVE before any return fire was allowed. In each such instance, specific (rather than general) permission to return fire was given. Positions were allowed to respond only after Marandola was advised of their situation and was satisfied that they were taking fire.

It is difficult if not impossible to describe the specifics of the morning gun battle. Early on, after the insertion teams reported from inside 6217 and 6223 that they were prepared to begin their operations, all Stake Out units were ordered to cease fire to determine whether MOVE was still firing. This was but the first of several lulls between numerous firearms exchanges. There were many points at which Marandola, in order to assess the

situation, would direct all officers to stop shooting unless it was absolutely necessary to protect their lives. All too soon, however, MOVE gunfire would resume.

Many police witnesses stationed in the surrounding posts told us of their experiences that morning. Officer John McDonnell in Post One felt objects come by him which he believed were bullets. Sergeant Griffiths in Post Four reported seeing bullets hit the sandbags and wood window frames at his station. (For safety reasons the window panes had been removed.) One bullet struck the sandbag immediately behind Officer Haworth in Post One; Officer Saxon at Post Seven, at Cobbs Creek Parkway and Osage Avenue, heard bullets ricocheting and told us that at least one bullet struck a vehicle parked at that somewhat removed location. Corporal George Minner, staffing an exposed rooftop post, heard bullets overhead. At times the gunfire from 6221 was so intense that it pinned down his men. Even smoke grenades provided inadequate cover to safely evacuate the rooftop positions. Ultimately, smoke projectiles offered sufficient cover to allow the Fire Department to remove two officers trapped on the roof by MOVE gunfire.

Perhaps the best description of the conditions which prevailed on the morning of May 13th was offered by LaCon. He testified as follows:

> A. My recollection, going back, is that approximately ninety minutes after the initial exchange of fire -- I don't mean to imply that there was continuous fire fighting, but what had evolved in that morning period were a series of very short, very intense exchanges

> of fire. Fire would break out. We would announce the information to Post 1. We would get the order to return fire. We would do that for ten or fifteen minutes. It would subside. Several minutes would go by and it would begin again.
>
> During one of these exchanges of fire, as near as I can recall, approximately seven-twenty or seven-thirty in the morning, I was struck in the back of the neck by a projectile that passed -- I believe one of those two holes that passed through the scalloped portion of the screen door.

LaCon escaped injury, however. The bullet merely split his protective helmet.

The gunfight eventually ended. Various witnesses estimated that it lasted perhaps 1-1/2 to 2 hours.

The conditions which the men in the insertion teams faced were even more difficult and hazardous. Within minutes of their respective entries it became clear to them and to the command structure that the plan was, in their words, "down the toilet." They nevertheless continued their efforts to accomplish their objectives. This subjected them to great risks. These included, on occasion, heavy gunfire. The difficult circumstances presented were exacerbated by an inadequate communications system. For instance, when the men in the posts returned fire, the lack of communication prevented them from knowing whether they were endangering other officers or placing their shots so as to provide the best possible cover for the insertion team officers under siege.

A full understanding of the nature and significance of the actions of the insertion teams requires some detailed discussion about explosives. Explosives are generally categorized as high or low level. The latter burn; the former instantaneously convert from a solid to a gaseous state, thereby creating much greater energy and force. A shape charge is an explosive device in the form of an inverted "V." This design enables the force of the explosion to be directed and makes it suitable to puncture a barricade. "Jet tappers," a type of shape charge, were used by the insertion teams. These small but high level explosive devices can be used to make a small hole in a wall. Their effect is minimal, however, if the wall is too thick. Moreover, as with any such charge, proper shaping is important, indeed essential, to minimize danger and fragmentation.

The explosives available to and/or used by the teams included HDP boosters (a high explosive), data prime sheets (also a high explosive), data prime boosters (dangerous in grenades; subject to fragmentation), C-4, Tovex, and det (detonation) cord. C-4 detonates at 24,500 feet per second and is appropriately used in shape charges. C-4 is also particularly useful in hostile situations as it will not explode if hit by gunfire. Tovex detonates at 17,000 feet per second. Det cord, which comes in long, rope-like strands, in varying strengths, detonates at 25,000 to 26,000 feet per second. (Its strength is measured in grains per foot; the more grains, the more powerful the explosive.) When used, it

is adhered to cardboard like caulk. Proper shaping is essential, however, otherwise excessive tearing and fragmentation can result.

Our investigation has established, without question, and for the first time, that C-4 was used by both Insertion Team A and Insertion Team B while they were attempting to complete their missions inside 6217 and 6223. The details concerning that usage are best set forth in the context of all of the actions of the teams. We begin with a description of Team B's activities.

Insertion Team B, under the command of Sergeant Edward Connor (a former Bomb Disposal Unit commander on temporary assignment for the May 13th operation), included two Bomb Squad members, Officers Angelucci and Muldowney, and four men from Stake Out, Officers Ryan, Draft, Freer and Marcello. Connor estimated that the team set out for 6217 between 5:45 a.m. and 6:00 a.m. They entered through the front door using a key obtained from the owner and immediately searched the house. As previously noted, the officers entered 6217 because it was believed that MOVE had taken control of 6219. Hence, the team's first objective was to enter 6219 through the adjoining front porch wall. The house's owner had been advised in advance about this aspect of the operation by Connor and assured that the City would cover any damages.

The team's original intent was to remove the adjoining porch wall with sledgehammers. That option did not seem viable or safe, however, considering the amount of gunfire being exchanged by the time they were ready to take action.

The explosives brought into the house by the team included two cardboard charges made with military grade det cord. One prepared charge's purpose was to blow a hole in the party wall between 6215 and 6217 should an emergency escape or evacuation route be needed. The team used the other cardboard hatch charge to open the common porch wall between 6217 and 6219. The four foot oval hatch charge used made a four or five foot hole between 6217 and 6219. It also carried debris across to the 6219/6221 common wall causing some damage to that wall, and contributed to the collapse of the living room ceiling in 6217 which apparently had been weakened by the water pouring into the building from the Fire Department squirt gun.

Before trying to enter 6219's porch through the hole which they had created, Connor threw flash-bangs into 6219. These were intended only to disorient any MOVE members inside the property. Then, as he started forward through the hole, Connor came under heavy gunfire. He saw gun flashes from the top of the 6219/6221 porch wall, apparently from gun ports which had been cut through the wall, and other gun flashes from the floor level. Freer believed that this gunfire from MOVE was coming from the doorway of 6219 or the east corner of 6221. Angelucci said that it looked like it was coming from a baseboard hole between 6219 and 6221, as well as from higher up.

Additional flash-bangs were thrown into 6219 to stop the gunfire but without success. Team members returned fire. Connor, who was spun around and hit forcefully in the back while trying

to retreat to 6217, was dragged into the living room and out of the direct line of fire while "[b]ullets were bouncing all over the place." A .38 caliber bullet was later removed from the back of his "body armor."

The MOVE gunfire assault on Team B continued. Officers in Team B fired back but the shooting from 6221 did not stop. Suppressive fire against 6221's porch did not halt the MOVE attack. Connor concluded that the extreme threat to his team made completion of their mission impossible. He decided that this threat could be eliminated only by removing the 6219/6221 porch wall which gave the MOVE combatants cover. At his direction, a charge containing 1-1/4 pounds of C-4, to be thrown at the wall, was prepared by Angelucci and Muldowney. (Here we detail only our findings with respect to C-4's use on the morning of May 13th. The pertinent facts regarding the various attempts to cover up C-4's use and possession by the Police Department, together with our assessments of the conduct of the officers involved, are extensively set forth in Part XII of this report.) Connor did not obtain permission from Post One to use C-4. Muldowney recalled a conversation between Connor and Marandola authorizing the use of explosives (albeit not C-4) to open up a better view of the fortifications on 6221's porch. There was other testimony, however, that no requests were made by Connor to Post One regarding any such use of explosives.

Although Connor expressed to his men a purported willingness to accept responsibility for C-4's use in the porch wall assault,

he refused to throw the charge himself. Rather, he ordered Muldowney to do this. Muldowney delivered the charge at great personal risk. While doing so he was exposed to gunfire from the waist up; Angelucci provided cover for him with an Uzi.

The first C-4 charge knocked down some of the wall but did not fully accomplish its intended result. There followed but a brief lull, then more MOVE gunfire. Connor called for the preparation of a second charge that was a "bit heavier." Angelucci and Muldowney prepared a second charge. According to their testimony, however, the same amount of C-4 -- a 1-1/4 pound block -- was used in that device. Once again, Connor declined to deliver the charge himself and ordered Muldowney to throw it.

The second charge had more dramatic results and substantially exposed MOVE's porch fortifications. A wooden structure attached to the porch's ceiling could be seen. It appeared to contain small bunkers and rectangularly shaped crawl spaces at the top and bottom. In the top crawl space Angelucci saw what he believed, with "90% to 95% certainty," was a dead body; we believe that this was John Africa. Freer also saw something in this space, but was uncertain whether it was a portion of a body or merely a jacket.

Even the second C-4 detonation did not stop the MOVE attack. Connor reported that firing from the MOVE compound continued. Some shots taken inside 6217 were at floor level, as if they were coming from the 6221 basement level; others appeared to be fired from inside the rear of 6219. The situation was considered a

stalemate. Accordingly, Powell and Team A, who had been waiting inside 6223 for the placement of Connor's charges before acting, were advised through Post One that they would have to proceed alone.

Connor's team remained in 6217 for some time thereafter. A periscope was delivered to Team B to see if 6221 could be attacked by way of the roof. After using this device to reconnoiter the compound through a skylight in 6217, it was determined that MOVE's bunker precluded rooftop access. Team B then left 6217 after another group of officers replaced them to maintain control of the premises.

Team A's efforts inside 6223 were equally if not more unproductive. Lieutenant Frank Powell, head of the Bomb Disposal Unit, was in command. Bomb Disposal Officers Klein and Laarkamp and Stake Out Officers Mellor, Berghaier, D'Ulisse and Mulvihill comprised the remainder of the team. Stake Out Officers Reiber and Graham delivered tear gas to 6223 sometime before 9:00 a.m. and remained inside. Graham also had extensive Bomb Squad experience.

After the team's successful entry into 6223 through the property's rear, the house was searched. Mellor was stationed on the second floor by the house's skylight. Because the skylight hatch was missing, the team members believed that they were vulnerable to attack through that opening.

The explosives brought by Klein into 6223 included three jet tappers and two det cord wall charges, as well as quantities of C-4, det cord, blasting caps and data prima sheets. Klein

said that he intended to make his own shape charge using C-4 if the jet tappers were inadequate to breach the walls. The team's supplies also included flash-bangs.

Immediately after entering 6223 Klein nailed a det cord hatch charge to the living room wall adjoining 6225. The purpose was to permit its immediate detonation, and the creation of a man-sized hole, if the team's emergency evacuation was necessary.

Their operation against the MOVE house began with detonation of a jet tapper in the basement. To avoid injury to individuals on the other side of the wall, this charge was placed high on the wall. Instead of penetrating the basement's stone wall, the jet tapper merely made a 1-1/2 or 2 inch deep hole, dislodged the basement steps, and caused many insects to fall on Klein. Fearing that the house's floor joists might be completely dislodged, and that 6223 might actually collapse as a result, Klein decided not to make a second attempt to breach the basement wall.

Klein and Powell next turned their efforts to penetrating the second floor party wall. At that point Berghaier, Mellor and Laarkamp were also on the second floor. The first jet tapper charge used on the second floor also failed to penetrate the wall. As they were about to try again with their final jet tapper, gun-fire erupted from the 6221 side of the bedroom wall. Powell returned fire with his Uzi. The police then sought refuge in a closet. Klein, who could not fit in the closet, stayed in the bedroom and suffered superficial injuries. While inside the

closet, Laarkamp began to hyperventilate; eventually he was evacuated by Berghaier.

Powell reported their situation to Marandola and urged him to direct gunfire at 6221's porch and second floor. At the same time Mulvihill and D'Ulisse, who were downstairs, received gunfire from 6221's porch. They took cover behind a radiator and returned fire.

The various officers on Team A had different opinions about the source of the gunfire which they received at this time. Powell, for example, admitted to the possibility that some shots were police ricochets, but felt strongly that the automatic fire which came through the bedroom wall emanated from MOVE. Klein and Mellor also felt that these shots were fired by MOVE. Mulvihill and D'Ulisse more readily acknowledged the likelihood that "friendly fire" had penetrated 6223. Based on all of the evidence before us we, too, believe that police weapons were the source of most, if not all, of this gunfire.

Powell estimated that he and other team members remained under cover, in the closet, for about twenty minutes. When they emerged, they continued their efforts to breach the second floor party wall using a jet tapper. Eventually they succeeded. By that time, however, the pepper fogger had broken and alternative approaches were necessary. Flash-bangs were thrown through the small opening, again to disorient the occupants, as were six to eight tear gas grenades. Much of the tear gas, however, returned through the hole and clouded the second floor of 6223.

The failure of the second floor efforts led Powell to adopt another strategy. He decided to blow a hole through the 6221/6223 first floor common wall and then create an opening into 6221's basement through which tear gas could be inserted. Powell sought permission from Post One to thus proceed. Marandola, Kirchner and Berghaier all remember Powell saying during this conversation that a low detonation explosive would be used. Marandola said that this was what Sambor had authorized.

The charge used, which was prepared by Graham and Klein, was anything but a low detonation device. It was a 2 by 2-1/2 foot wall shape charge made up of det cord, data sheet and either 1/3 of a pound or 1/3 of a 1-1/4 pound block of C-4. After activating the five minute fuse, Team A left 6223. When it detonated, from 2-1/2 to 3 feet above the floor, it caused very extensive damage. It blew an air conditioner out of 6223 and into the back alley, demolished the porch of 6223, and made 6223 so structurally unsafe that it could not be reentered (despite an attempt by Graham). The explosion also more fully exposed the fortifications on 6221's porch. After the explosion, Officer Tursi, stationed across the street in Post One, could see inside 6221

> a log cabin within a house. It would almost be like taking the front wall down and having another wall inside that. It was constructed basically of large timber, trees.

Both Klein and Graham told us that, when detonation occurred, they heard what sounded like two distinct explosions. Graham said that he believed that this was the result of a sympathetic

detonation of a charge which had been set by MOVE inside 6221. We decline to make any factual finding concerning this hypothesis.

Because this final explosion inside 6223 (which was estimated to have occurred sometime after 9:00 a.m.) made it impossible to safely reenter 6223, Team A evacuated the area. Before leaving, the officers kicked down MOVE's back alley fence. At that time they heard children's voices in the basement; until that point they had been unaware that children were present. The officers then considered inserting tear gas through a pipe protruding from the basement area of the compound. This was rejected, however, for fear of harming the children and because at least one rifle was spotted protruding from the rear of 6221. Accordingly, the team left the alley and proceeded to Cobbs Creek Parkway.

We have considered whether any of the previously described police actions merit criminal charges. Charges which arguably could apply to these above described actions include murder, manslaughter, aggravated assault, risking catastrophe, and recklessly endangering another person. Significantly, however, we have found that all of the assaultive police conduct began only after MOVE fired at police. Furthermore, the police actions were all directed toward the goal of executing judicially approved arrest and search warrants.

Section 508 of the Crimes Code specifically authorizes the use of deadly force by police where, as here, they are attempting to make an arrest and a forcible felony has been committed or

human life is endangered. The only question for us to consider, therefore, is whether the force used by police was excessive and unjustified. We address separately each of the morning assaults on the MOVE compound.

First, we consider the police gunfire directed at 6221 Osage Avenue. The sheer number of rounds directed at the compound, with the children inside, led a majority of the MOVE Commission to term police gunfire "unconscionable" (Findings and Conclusions, No. 18). This finding is inappropriate given the well-considered gunfire control plan devised by the police to minimize danger to anyone other than the armed resisters. The firing of so many bullets, while unnecessary and dangerous, was not so excessive as to mandate criminal liability.

The designers of the operation had developed a contingency plan in case, as actually occurred, MOVE responded to the surrender order with gunfire. Police could not initiate any firing and, moreover, could fire back only with express approval from Marandola unless an officer's life was in imminent danger. Even after gaining approval from Marandola, an officer could only fire at combatants who were actually firing at the police. Police adhered to these instructions, firing only in response to MOVE gunshots directed at the insertion teams or posts, and aiming only at MOVE gun positions. Thus, when Ramona Africa became visible in the front of the compound during the afternoon, Marandola ordered police to hold their fire because she was not then shooting at police.

The only flaw in this fire control procedure was the absence of a mechanism to stop the gunfire beyond Marandola's intermittent cease fire orders. The MOVE Commission found that police fired over 10,000 rounds at the MOVE compound (Findings and Conclusions, No. 18). This number is erroneous. Unquestionably, police checked 9,400 rounds of ammunition out of the pistol range that were not returned and borrowed ammunition from other sources. That amount, however, is not reflective of how many rounds were fired by police as it includes large amounts of unfired ammunition which exploded after being abandoned in the police posts which caught fire. For example, Marandola alone abandoned 1,000 rounds of M-16 ammunition when he evacuated Post One.

Based on the evidence before us, the police probably fired far too many rounds. Further, some of these rounds apparently "overpenetrated," going through the front of 6221 Osage Avenue, passing through a side wall, and just missing officers on one of the insertion teams. Only luck saved police officers from being killed by "friendly fire." The sheer number of rounds, however, does not make this police action criminal. The fact remains that gunfire was directed only at combatants and only while they fired on police. The number of bullets does not change the nature of the conduct: All police gunfire was a justified response to MOVE gunfire. Thus, while the use of so many rounds may have been unnecessary, it was not unlawful.

Our next consideration is the use of explosive charges by the insertion teams. As is apparent in the evidence discussed

above, the charges were used for two purposes: (1) to gain entry to 6221 Osage Avenue; and (2) to stop gunfire from fortified positions inside the MOVE compound. The police involved clearly had insufficient experience to perform either of these tasks with explosives. While their use of explosives was ill advised, however, it does not warrant criminal charges.

The devices used to gain entry to the MOVE compound ranged from small jet tappers to Klein and Graham's use of a C-4/data sheet combination. The purpose of all of these charges was to cut holes in the MOVE fortifications to allow the introduction of water and tear gas. These uses of force were measured attempts to open the MOVE compound without causing injury to anyone inside.

As there was no intent to harm anyone inside the house, we have considered whether any crimes of recklessness occurred, particularly because explosives were used against a house in which gasoline was presumably stored. The applicable crimes are risking catastrophe and recklessly endangering another person. Under these sections, the police would be liable only if they consciously disregarded a substantial risk that their conduct could cause injury to non-combatants. (As is discussed below, police had no obligation to avoid harming MOVE members who were firing at police.) Two factors rule out prosecution for these crimes. First, the explosives used were selected and shaped to knock holes in the walls of 6221 Osage Avenue and cause minimal risk of fire or injury on the other side. Second, any gasoline inside the house was believed to be in the basement. The only explosive used against

the basement walls was a small jet tapper. Thus, it is apparent that police did not disregard a substantial risk of harm but rather recognized the risk and took steps to minimize it. Many of the explosives used were so weak that they failed to breach the MOVE fortifications. It also appears that none of the charges used to enter the MOVE compound caused any injury to anyone inside. No indictment for criminal conduct is merited for the use of explosives to attempt entry to 6221 Osage Avenue.

The explosives used to stop gunfire from inside the compound are of a different nature. While these charges were also intended to destroy MOVE fortifications, specifically the front porch bunker, they were not designed to insure the safety of those behind the barricade. As this force was only used against MOVE combatants, however, this police conduct was justified under §508.

When the first hatch charge opened the porch between 6217 and 6219 Osage Avenue, police fairly believed that MOVE had broken through the wall between 6221 and 6219 Osage Avenue. Police then threw flash-bangs into 6219. These explosives, made of HDP boosters, were intended merely to disorient MOVE members with sudden bright light and loud noise so that police could advance into 6219. James Phelan, a demolitions expert, testified that HDP boosters are powerful explosives and are far too dangerous a substance to use in flash-bangs. Despite the inappropriateness of their employment, however, the boosters had been tested and found harmless. Further, no injury resulted from their use. Hence,

rather than giving rise to criminal charges, this conduct only demonstrates the inexperience of the police in using explosives.

Unfortunately, the hole in the party wall between 6217 and 6219 created a direct line of fire between the front porch bunker in 6221 and the police position in 6217. MOVE took advantage of this, firing many shots and hitting one officer in the back. Further, police were vulnerable to attack from 6219. Hence, at Connor's direction, one block of C-4 was thrown at the 6219/6221 porch wall to destroy the covering wall and reveal MOVE's gun positions. When the firing did not stop, a second block was thrown. One of the combatants, presumably John Africa, was apparently killed by the second explosion.

This use of deadly force by the police was justified under §508. While police had been attempting to execute valid arrest warrants, MOVE combatants had committed various forcible felonies, including shooting an officer. Gunfire continued from behind MOVE fortifications. Under these circumstances, response with deadly force was warranted and not criminal.

The only remaining question is whether response with blocks of C-4 was so excessive as to require prosecution. At the time that the C-4 was used, police firearms had failed to stop the gunfire from the MOVE compound. Service of the warrants and protection of the police mandated removal of the massive fortifications inside 6221 Osage Avenue. Use of C-4 to accomplish this goal cannot be deemed criminally excessive as this force was applied only against combatants. Indeed, even a block of C-4 was

insufficient to fully breach the porch bunker fortifications and a second block had to be used. Thus, §508 remains applicable and no charges are merited.

In sum, it appears that the large number of rounds fired by police may have been an unnecessary exercise of force. Further, it is very clear that police did not have the proper training to use explosives as offensive weapons. Neither did the Police Department have in place adequate procedures with respect to the use of explosives. Accordingly, if it has not already been done, we recommend that the Department adopt strict procedures governing the use of offensive explosives, which include a written proposal for each use which must be approved by the highest levels of the Police and Fire Departments and the City Administration.

It must be noted, however, that police used deadly force only against those who had fired at them and employed limited explosives in all other situations. Given the relentless gunfire from MOVE members and the massive fortifications inside the compound, the degrees of force used against MOVE combatants do not warrant criminal charges.

VII. THE USE OF THE SATCHEL CHARGE

The most critical area of our inquiry has been the City's decision to drop an explosive device on the MOVE compound and its subsequent decision to let the resultant fire burn. That fire started when, at Sambor's suggestion and with Goode's approval, police dropped an explosive device on the roof of the MOVE compound, intending to destroy the bunker and to create a hole through which police could then pump tear gas into the house. This plan failed, however, with disastrous results. When the device (which missed the bunker entirely) exploded, it set in motion a chain of events which resulted in the ignition of vapors from cans of gasoline near the bunker. A small roof fire ensued. The City did not extinguish the fire promptly, and later could not extinguish it before at least ten people had died and sixty-one homes had burned to the ground.

We questioned the Mayor, the Managing Director, the Police and Fire Commissioners and all other persons intimately involved in these events. We extensively considered whether anyone acted criminally in making the decisions which led to this disaster. Our inquiry into these extraordinary events disclosed significant factual questions and problematic legal issues. After painstaking consideration and lengthy discussion, we have determined not to bring criminal charges: We have concluded that, factually and legally, no prosecution is sustainable. To bring charges simply because our visceral reaction is that, given a disaster of this

magnitude, someone must have acted criminally would be cathartic but improper.

Although the evidence adduced before us does not support criminal charges, it does reveal incredible incompetence by the City officials involved in making these crucial decisions. The motifs apparent in preparing for the confrontation -- an absence of thoughtful consideration of the plan, unwarranted haste, and poor communication among crucial persons on crucial issues -- were all apparent first in the decision to drop the charge and then in the decision to let the ensuing fire progress. Once again, the testimony revealed a lack of particularized inquiry by City officials and, instead, a willingness to accept general answers to general questions ("Will it work?" "Is it safe?"). Perhaps this disaster could have been averted had officials asked even the most minimally probing questions (e.g., "How is it that no risk of fire is posed by an explosive device designed to destroy a steel-reinforced bunker and simultaneously blow a hole through the roof into a house believed to contain explosives and gasoline?").

This chapter examines the decision to use the satchel device; the next examines the decision to let the fire burn. In each, we first review the testimony concerning how these two critical decisions were made. That testimony illustrates the grievously flawed decision-making process and provides the essential framework for our subsequent discussions regarding possible criminality. These discussions include a review of the applicable law, after which

we apply that law to the facts, more specifically explaining why the evidence does not warrant the return of indictments.

We first review the evidence concerning how the decision was made to use the satchel charge. Although there is some disagreement among the principal actors regarding critical events preceding this decision, the overall facts are not disputed.

At noon on May 13, 1985, Powell informed Sambor that the original plan had to be abandoned. Sambor then asked Powell to "talk to his people" [the Bomb Disposal officers] to see whether anyone had any ideas, and specifically suggested that they consider using an explosive device to create a hole in the roof through which tear gas could be pumped into the house.

After this conversation, Sambor took Brooks, Richmond and others inside Post One to view the impressive MOVE fortifications which had been exposed in the police assault. Brooks testified that he, Sambor, Richmond, Licenses and Inspections Commissioner James White and Health Commissioner Stuart Shapiro then discussed how to remove the bunker. White left to investigate using a crane, and the others discussed using an armored vehicle with a battering ram. As with the crane option, Brooks testified that Sambor did not indicate to him that these ideas already had been explored and rejected.

At approximately 4:00 p.m., Sambor, Brooks, Richmond and several others met at the Geriatric Center. Sambor recalled that they discussed various options for proceeding against MOVE, such

as using an armored vehicle or crane to remove the bunker, attacking over the roof, or conducting an assault on the front or back of the building. Richmond recalled that Hawthorne was present and said that a crane could be used to dislodge the bunker, but that its operator would be within MOVE's firing range; thus, this option was again rejected. They discussed having an officer put an explosive into the bunker, but dismissed that idea as too risky. Sambor then suggested using a helicopter to drop a "satchel charge" on the bunker to dislodge it and to create a hole in the roof through which an officer could put tear gas. After Brooks and Sambor agreed that the idea was feasible, Sambor summoned Powell.

Powell arrived within a few minutes accompanied by Klein. Sambor asked Powell whether he could devise a charge that would destroy the bunker and create a hole in the roof and, if so, whether he could deliver such a charge. Powell spoke with Klein briefly and then replied affirmatively to both questions.

Sambor testified that Brooks and Richmond asked questions and that he and Powell offered answers. Richmond asked Powell whether the device would start a fire. Richmond, Sambor and Brooks each recalled that Powell assured them that there was virtually no risk of fire. Powell and Klein both testified, however, that there was no discussion concerning the risk of fire, with Powell adding that, had they discussed it, he would have told them there <u>was</u> a potential for fire. Klein's testimony, however, suggests that he would not have disagreed with Powell's alleged response that there was no risk of fire. Klein

told us that C-4 is non-incendiary ("if you light it and burn it, it doesn't explode"), and also said that he was never worried about a fire occurring and was puzzled when one did result. We have found the testimony of Brooks, Sambor and Richmond concerning this conversation to be credible.

Powell was also asked whether the satchel charge posed any risks to the occupants. Sambor recalled that Powell responded that it would be a minimal charge designed specifically for what they had in mind, and that it would present little or no danger to the occupants of the house, even if they were on the second floor. Klein recalled, however, that when Brooks asked Powell what the explosives would do, he (Klein) answered that it would knock the bunker -- and anyone inside -- to the sidewalk:

> I think I told him it would stand the bunker up, drop it down on the sidewalk. If [any MOVE members in the bunker] survived the crash on the sidewalk, they wouldn't be able to hear for a week, but they would probably live, because the blast itself would not kill them. If they could survive that fall from the second floor to the ground, they would live, but they would have a problem with hearing for awhile.

Powell remembered telling them that although he did not know whether the satchel charge would remove the bunker, it would at least disable it.

Finally, the manner in which the device would be delivered was discussed. It was agreed that they would drop the device from a helicopter onto the bunker. Brooks then called the Mayor, to whom he previously had explained the alternatives being explored. Brooks testified that he told Goode by phone:

> Sambor doesn't have any other way that he can find to get that thing down from there. He plans to take a helicopter and drop an explosive device right on the bunker and then, go up to it and put water and tear gas in the hole.

Sambor testified that he could not hear Brooks' every word, but recalled that Brooks outlined the plan for Goode, using words like "explosives" and "helicopter." Similarly, Klein testified that Brooks made a phone call and said:

> ... "We're going to use the helicopter," and again, he said, "We're going to use two and a half pounds of plastic explosives," or "two and a half pounds of C-4, and we're going to drop it from the helicopter in a satchel." He did say satchel.

Goode, however, denied knowing that the device was going to be dropped from a helicopter and testified that he thought police officers were going to crawl across the roof and place the device against the bunker:

> Q. And whether [using police officers to place the charge against the bunker] was, in fact a possibility, given the limitations of that day; that is, in fact, what you believed was going to occur, correct?
>
> A. Without question.
>
> Q. Now, am I correct that you do not remember Mr. Brooks telling you that they were going to drop the device from a helicopter; is that right?
>
> A. I do not recall the word helicopter.
>
> Q. Do you recall the word drop?
>
> A. I do not recall the word drop.
>
> Q. Do you recall having any idea how this device was going to be placed on the roof in order to knock the bunker onto the street?

A. What I did think?

Q. Yes.

A. I thought it was going to be placed there by one of the police officers on the roof crawling over there and placing it there and then moving away from it. That is what I thought in my mind.

Q. You certainly cannot think of any reason why Mr. Brooks would intentionally deceive you as to the mechanism by which this device --

A. He is a very honorable man. I'm sure he would always tell the truth as he understood. I'm sure if he says he told me he was going to use a helicopter, he believes deep down inside he told me.

* * *

I was surprised that it was dropped from a helicopter. I recall being very surprised that the helicopter was used to drop this device.

Goode so testified even though previously he had told us that he "understood that [the police] felt they could not safely go onto the roof and into the house from the rooftop with that bunker being there." Further, Lieutenant Fred Ragsdale, a police officer assigned as Goode's bodyguard, told us that as Goode and members of his staff watched television just before the explosion, Goode said "Watch this" and, moreover, registered no surprise at the scene displayed.

Goode's recollection of his decision to approve the use of an explosive device was that he paused thirty seconds, asked whether Sambor knew of the idea, whether Brooks thought it would

work, and when the police planned to do it. After this briefest of inquiries, Goode approved the plan:

> My recollection is that, "You know the crane will not work. We have concluded that we will blow off the bunker by using some type of plastic explosive charge." And I paused for a half a minute, perhaps or some seconds. And I said does Commissioner Sambor know about this? And he said, "Yes, it was his idea or his plan." And I said, "Do you think it will work?" And he said, "Yes, I think it will work."
>
> And I said "Okay." That is the extent of the conversation as I understood it.
>
> * * *
>
> So I did not go into detail, [had he] thought about A, B, C or D. I asked him will the plan work.
>
> * * *
>
> ... I had two very experienced operations people out there.... I did not go through each time I talked with them a checklist and say "Have you thought about this, this and that?" I did not do that, sir.

At the conclusion of his conversation with Goode, Brooks turned to the others, telling them that the Mayor understood and they should proceed.

Other testimony which we heard regarding this conversation between Goode and Brooks has caused us to consider whether the decision-makers acted pursuant to an artificially imposed deadline for completing the operation. Klein testified that, after Brooks spoke with Goode, "He hung up and he said, 'He wants it done before dark.' He said 'He wants everything done before darkness. He wants them out of there before it gets dark.'"

Goode denied having a deadline. He said that he was concerned that the police would be subject to greater risks after dark, but added:

> I was not in charge of the operation. I did not have a deadline. I was at my office receiving reports from the field operations people and responded to what their concerns were. If they had said to me, "Mr. Mayor, we can safely go three or four days," I would have said if that is your professional opinion, fine. If they said nightfall poses a problem, they are at the scene. They know what their limitations and their problems are, and they know what they have to do to maintain security at the scene there.

Brooks similarly testified that he did not recall Goode saying at any point that he wanted the operation to be completed that day.

Although there is no corroboration for Klein's testimony as to this point, we previously have noted that the City began the entire operation pursuant to an artificial deadline; to attempt to conclude the operation by an artificial deadline would have been consistent, and not unlikely, given that sixty-one families were waiting to go home and massive police resources were gathered at the scene. Whether or not immediate completion of the operation was a subconscious motive, no one testified to any discussion of calling off the operation. Rather, the meeting simply ended and the participants began preparations to drop the satchel.

Powell testified that before he left the meeting, Sambor specifically instructed him not to inform the police in the posts about the planned use of the satchel charge. Powell told Marandola nonetheless. Powell was concerned that, although MOVE was sheltered by the structure of the house, the police across the

street were exposed because the force of the explosion would travel laterally across the roof when the charge detonated. Furthermore, Powell was concerned about the other risks to the police: "We might get shot down, I might miss the roof.... Even if it landed directly behind the bunker, you know, if I blew up the bunker, I didn't know what was going to happen. I might throw the bunker right into Post Two or Post One. Distance-wise, we were not that great. I didn't know what was going to happen."

Sambor admitted that he may have told Powell not to tell Marandola or the other officers about the plan. Because Powell had said that the satchel charge posed no danger to the occupants, Sambor reasoned that there could not be any danger to anyone else. Moreover, he felt that "[t]here was no need to get people all worked up and excited and possibly do something that was not calculated that would jeopardize what was to be done."

This is yet another instance where a lack of discussion and particularized inquiry may have caused unnecessary risk. The satchel charge was not considered dangerous to MOVE members because it was believed that they were in the basement. Two of the police posts were located on rooftop positions, however, and officers assigned to the other posts were at upper windows in the surrounding houses. The charge would detonate at right angles, potentially driving debris across the roof. Clearly, an explosion sufficient to destroy the bunker might propel the debris toward these officers. Powell was aware of all of these risks (and of the additional risk that, in dropping the charge, he might miss the roof of the

house completely), yet he evidently did not discuss his concerns with Sambor. He did countermand Sambor's order, telling Marandola to evacuate the posts. However, the safety of the police officers should be protected through the discussion of risks and worst-case scenarios by decision-makers, not by the countermanding of orders.

After the meeting, Klein and Powell left the Geriatric Center. Klein constructed the bomb by himself, using two sixteen-inch tubes of Tovex and one block (1-1/4 pounds) of C-4. The C-4 was included as a "blasting cap" to detonate the Tovex. Klein said he could have used HDP boosters to detonate the Tovex instead of C-4 (because HDP boosters detonate at almost the same rate at C-4) but instead chose C-4, an explosive he described as "safe."

Powell then dropped the satchel on the roof from a State Police helicopter. The mechanics of the explosion and fire on the roof are discussed in Part VIII. For analysis of the issue here, it is sufficient to note that detonation of the charge caused wood on the roof to splinter. These wood splinters were driven through the gasoline vapors by the force of the explosion. The gasoline vapors, when exposed to the heat of the explosion, ignited.

Before examining this evidence under the law relevant to our decisions whether to indict Goode, Brooks and Sambor, we will address Klein's inclusion of C-4 in the satchel charge and whether that was a criminal act. There has been much public discussion concerning Klein's use of C-4. Shortly after the device was

detonated, Sambor stated publicly that it contained only Tovex. Three months later, however, Klein gave a statement to Homicide Captain Eugene Dooley in which he said he used C-4 as well as Tovex. Although this "admission" precipitated speculation that the unintended fire was caused by the C-4, we have concluded that Klein's use of C-4 was neither unknown to City officials nor particularly material to the disaster which ensued. The use of plastic explosives (a category of explosives which includes C-4) was discussed by the Mayor, the Managing Director and the Police Commissioner and, if not specifically approved, was not prohibited. Moreover, although C-4 is more likely to cause a fire than is Tovex, in this instance it made no difference: it was the explosion itself -- not the type of explosive used -- which caused the ignition of gas vapors and the subsequent fire. The fire which resulted did not emanate from point of detonation. (Similarly, no fire resulted from the earlier use of C-4 during the morning.)

Klein told us that Brooks and Sambor had authorized the use of C-4, and both Brooks and Goode testified that they anticipated the use of plastic explosives. Klein testified that, in discussing the satchel charge proposed at the afternoon meeting, Brooks asked Powell what two pounds of "C-4" or "plastic" would do to the bunker. Klein then interjected that C-4 came in 1-1/4 pound blocks, and Brooks asked Powell what 2-1/2 pounds would do. Klein could not remember which of the two terms -- "C-4" or "plastic" -- Brooks used. He explained that the terms are interchangeable: C-4 is one type of plastic explosive. (Tovex, however, is not a plastic

explosive.) Powell also testified to a similar recollection of this conversation.

Brooks admitted that the word "plastic" was used during the discussions, although he said he was not the first person at the meeting to use the term. Brooks also said that he did not specifically recall anyone using the words "C-4" or "Tovex," and did not think he used a specific term when he relayed Sambor's proposal to Goode. (Brooks said that despite his military background he had only a minimal knowledge of explosives and did not know the difference between Tovex and C-4 on May 13, 1985.) Goode testified that Brooks told him "[w]e have concluded that we will blow off the bunker by using some type of plastic explosive charge." Sambor -- who, at the time of the meeting, had a general familiarity with C-4 as a plastic military explosive which came in bricks -- said C-4 may have been mentioned in a very general sense at the meeting, but did not "recall at all anybody mentioning C-4 as C-4 itself being used, No, sir." Sambor further said that, at the conclusion of the meeting, he thought that they were going to use "this new kind of explosive ... I knew specifically that its name was Tovex." Finally, Richmond said that he only recalled Sambor using the phrase "satchel charge" and did not recall any mention of C-4 or Tovex, terms which meant nothing to him. (Richmond may have left the meeting before the content of the satchel charge was discussed.)

We have concluded that Klein's use of C-4 was not prompted by any insidious motive. He testified credibly to his belief

that there are no major differences between C-4 and Tovex and his understanding that, although C-4 is more powerful than Tovex, it poses no greater danger of fire and is actually safer than Tovex. (In fact, Klein testified that he was puzzled by the ensuing fire because he knew C-4 to be non-incendiary.) Klein said that, for these reasons, he would have preferred to use only C-4 and no Tovex. Finally, Klein told us that every Bomb Disposal Unit in the country except Philadelphia's uses C-4.

Although Klein's testimony was sincere, his information was erroneous. Explosives expert James Phelan testified that C-4 does pose a greater risk of fire than does Tovex. Moreover, Angelucci testified that Tovex takes on the properties of other explosives with which it is used; thus, detonating C-4 and Tovex together would have a synergistic effect. Similarly, Phelan said that detonating Tovex and C-4 together increases the heat produced and thus increases the risk of fire.

Nonetheless, however wrong Klein was about the characteristics of C-4, his error in no way affected the explosion which caused the roof fire. Since Tovex alone also would have caused the fire, inclusion of C-4 had no impact on the ensuing events and will not be considered further in the discussion of potential criminality.

Having briefly reviewed the evidence of how the decision to use a satchel charge was made, we will now review the law which has governed our discussions of whether anyone acted criminally in making this decision. We have been instructed that there are

four basic elements common to all crimes: (1) an act (for example, the act of dropping an explosive device on the roof of 6221 Osage Avenue); (2) a result (e.g., the deaths of MOVE members and children inside the house); (3) a criminal state of mind associated with the act (e.g., "recklessness"); and (4) a direct causal relationship between the act and the result. Each of these elements must be present before a crime may be found or charges brought. Additionally, individual crimes also have additional specific elements which must be present, together with the four elements listed above, before a crime may be found or charges brought.

Our inquiry regarding the decision to drop the satchel focused on three persons: Sambor, Brooks and Goode. The evidence shows that Sambor suggested using an explosive device against the bunker, Brooks relayed the suggestion (which he endorsed) to Goode, and Goode approved it. Thus, the first element -- that of an act -- exists as to all those involved in the decision. As noted earlier, Richmond was not really involved in the decision and it was not his to make. He asked the one question which was relevant from his perspective: Would this device cause a fire? He was assured that it would not. Apparently, he then left the meeting. Because of his minimal role, we will not further consider whether he acted criminally in connection with the decision to drop the satchel charge. Similarly, we will not further consider whether Powell and Klein acted criminally concerning this decision which, again, was not theirs to make. They answered factual questions to the

best of their knowledge and took no actions other than those pursuant to orders.

It is clear from the evidence that the first element -- that of an act -- is present as to Goode, Brooks and Sambor. It is also clear that the second element -- a result -- is also present in the death, injury and destruction which occurred. It is not clear, however, that the death, injury and destruction which resulted were directly caused by the acts of Goode, Brooks and Sambor. Neither is the evidence clear with respect to the state of mind of those principally involved in making this decision.

We will first discuss the element of causation under the law. We have been instructed that, in order to be considered a cause of any result, whether it be death or some other result, a person's conduct must be a direct and substantial factor in bringing about that result. There can be more than one direct cause. But a person's conduct is not a direct cause of the resulting harm if the intervening acts of others break the chain of events. We, therefore, have considered whether the acts of other persons, including the MOVE members themselves, played such an independent, important and overriding role in bringing about the resulting harm, compared with the first act (the decision to use an explosive device), that the first act does not amount to a direct and substantial factor in bringing about the resulting harm. A person's conduct may be the direct cause of the harm even if his conduct was not the last or immediate cause of the harm. It need only start an unbroken chain of events. However, whether the

conduct of others relieves the original actor of liability for his first act also depends on whether the intervening conduct was foreseeable to the original actor.

Thus, the question here as to each decision-maker (Goode, Brooks and Sambor) is whether the decision to drop an explosive device directly caused the death of the MOVE people and the destruction of the neighborhood, or whether the fire which resulted, the initial failure to fight the fire, the decision of Fire Commissioner Richmond and Police Commissioner Sambor to let that fire burn, the subsequent inability of the Fire Department to fight the fire, and/or MOVE's decision to remain inside a burning building and/or to keep their children inside a burning building, were intervening, superceding events which the decision-maker could not foresee.

In addition to considering whether the decision to use the satchel charge was the cause of the harm under the law, we have also considered whether the decision-makers here acted with a criminally culpable state of mind ("mens rea") in agreeing to use a satchel charge. A person cannot be criminally charged for his conduct unless he acted with a particular state of mind or level of culpability. The definition of each crime requires that a person commit the act with a minimum level of culpability. Generally, there are four levels of culpability: a person may commit an act intentionally, knowingly, recklessly or negligently. By contrast, if a person commits an act merely as the result of his

ignorance or mistake or bad judgment, he may be civilly liable or morally responsible, but he cannot be charged criminally.

In deciding whether any charges should be brought against those involved in the decision to drop an explosive device, we were instructed as to the legal definition of conduct which is intentional, knowing, reckless and negligent. We have been told that someone acts "intentionally" if it is his "conscious" objective to do a particular act or cause a particular result, and, where there are related attendant circumstances, he is aware of those circumstances or believes or hopes that they exist. (We understand that "conscious" means to be aware of and consider something.) We have also been instructed that a person acts "knowingly" if he is aware that it is practically certain that his conduct will cause a particular result.

Additionally, we have been given the legal definition of recklessness. We have been told that "recklessness" has four elements: (1) the actor was aware of a risk that a particular occurrence would result from his conduct; (2) the risk was substantial and unjustifiable; (3) the actor nevertheless consciously disregarded the risk; and (4) considering the nature and intent of his conduct and the circumstances known to him, his disregard of the risk involves a gross departure from the standard of care that a reasonable person would observe in the actor's situation.

Finally, in considering whether any of the decision-makers acted recklessly in approving the use of an explosive device, we have been careful not to confuse legal "recklessness" with legal

"negligence," which is a lesser level of culpability. We have been instructed that a person acts negligently when he should be aware of a substantial and unjustifiable risk that a material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and intent of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

To further guide our deliberations in determining whether anyone acted "recklessly" or "negligently," we identified four specific risks which attended the decision to drop an explosive charge:

> 1. The explosive charge, or debris propelled by its explosion, would cause gas cans on the roof to explode, igniting a fire which could not be controlled;
>
> 2. the charge would propel debris into the house and kill or injure people on the second floor;
>
> 3. the charge, or debris propelled by it, would drop into the house and touch off explosives or gas in the house, killing or injuring anyone on the second floor and anyone on the first floor or in the basement who did not (or could not) flee; and
>
> 4. the charge would kill or injure people in the bunker itself, either immediately upon explosion or in dislodging the bunker into the street.

Several factors must be considered in weighing the substantiality of all of these risks. In discussing the nature of the

first risk listed above, three facts became important. First, we heard expert testimony that the fire which resulted was not caused by the satchel charge itself, but by the ignition of vapors from gas cans on the roof. Thus, had the gas not been on the roof, no fire would have occurred on May 13, 1985. Second, this fire could have been extinguished by the squirts at any time from its inception at approximately 5:30 p.m. until 6:15 p.m. Thus, had the decision-makers actually considered this particular risk posed by the use of the satchel charge, they might reasonably have concluded that it was not substantial and proceeded with the plan. Third, the thousands of gallons of water directed at the roof that day did not prevent a fire from occurring because the water evaporated almost instantly in the 7,000° heat created by the explosion of the charge. (However, there is no evidence that Goode, Brooks, Sambor or Richmond thought that that water diminished the risk of fire.)

In assessing the nature of the second risk, we recall that the stated purpose of the satchel charge was to create a hole in the roof through which police could pump tear gas. Obviously, then, the satchel charge, at a minimum, posed a danger of falling roofing material and plaster to anyone on the second floor.

Finally, in assessing the nature of the fourth risk, we are aware that the use of force against anyone in the bunker was arguably justified under the statutory provisions permitting the use of force in law enforcement, briefly referenced in Part IV and more fully discussed below.

With this basic legal framework in mind, we will now discuss the evidence and specific charges which we considered bringing against specific individuals.

The charges which we considered bringing against Goode for his decision to drop the bomb were: conspiracy, murder, involuntary manslaughter, aggravated assault, reckless endangerment, arson, causing or risking a catastrophe, failure to prevent catastrophe and criminal mischief. The initial question in assessing Goode's liability for these crimes is whether his conduct in approving the dropping of the charge was "reckless," the minimum mens rea required for all but two of these charges. (Gross negligence is the minimum mens rea required for involuntary manslaughter (causing the death of another as a direct result of doing a lawful or unlawful act in a reckless or grossly negligent manner). Negligence is the minimum mens rea required for criminal mischief (intentionally, recklessly or negligently damaging the property of another in the employment of explosives). Although these two crimes can be proven where the actor's conduct was negligent, we do not discuss whether Goode's conduct was legally negligent because prosecution for manslaughter is precluded by problems in proving causation, as we discuss below, and prosecution for criminal mischief is precluded because dropping the charge was an arguably justified act as to the bunker on the 6221 Osage Avenue property and was not the direct cause of damage to the other properties.)

The evidence we heard suggests that Goode's conduct was not reckless under the law; that is, that he did not consciously disregard a substantial and unjustifiable risk that people would be placed in danger of death or serious bodily injury as a result of his approval of the device's use. Goode did have knowledge of some risks. He testified that he knew that there might be gasoline on the roof and explosives in the house. He further testified that he knew that MOVE had claimed it would blow up the block, that the children were still in the house, and that MOVE was likely to use the children as shields. Other evidence suggests, however, that Goode believed that these risks had been neutralized and that he did not realize that these risks were "substantial." Moreover, there is no evidence that he "consciously disregarded" these risks.

Goode testified that, in making his decision, he assumed that the gasoline cans had been washed off the roof, if he thought about it at all:

> [I]f I thought about gasoline, I'm sure I thought about all the water up there washing the gasoline away, not believing there was any danger to any of us. If I had any thought process at all, it was the fact that for hours thousands of gallons of water had gone onto the roof....

Further, Goode told us that he did not query Brooks about the explosives -- or any other specific concerns, for that matter. Instead, he explained, he relied on Sambor's assurances that the plan would "work" (i.e., that the occupants of the house would be safely removed), and on the fact that he had "two very experienced

operations people [Brooks and Sambor] out there in the field," who understood his instructions that the operation must be safe. Additionally, he testified that he thought that the bomb would blow the bunker into the street without risk to the people in the house. He explained that he had seen explosives demonstrated which could blow doors off the frame without damaging the frame. Moreover, Brooks testified that, when presented with the proposal, Goode asked him whether there was a possibility of fire, and was told by Brooks that there was little to no possibility of fire. (Goode's testimony about this conversation with Brooks, however, makes no reference to any inquiry about the possibility of fire; indeed, Goode specifically told us that he did not go through a checklist, asking "Have you thought about this, this and that?" each time he spoke with Brooks.) Clearly, Goode, who had little appreciation for the nature of the risks involved to begin with, did not "consciously disregard" those risks.

Moreover, the remainder of the statutory definition of "reckless" further buttresses a conclusion that Goode lacked this mens rea. The statutory definition continues:

> The risk must be of such a nature and degree that, considering the nature and intent of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation.

The nature and intent of Goode's conduct are evidenced by his actions concerning MOVE in the preceding year: he wanted to avoid confrontation, and when confrontation was inevitable, he

wanted to minimize it. He took no action until the neighbors were threatening violence, he was adamant that whatever plan was drawn up provide for the safety of all concerned, and he wanted Sambor to be careful in choosing police officers for the operation. From the evidence it appears that his intent in approving the charge was not to burn down the neighborhood or even the house. He wanted only to destroy the bunker.

Similarly, examining Goode's conduct in light of the "circumstances known to him" also supports a conclusion that he did not consciously disregard a substantial and unjustifiable risk. As noted above, Goode testified that he had seen explosives demonstrated which could blow doors off the frame without damaging the frame. Further, according to Brooks, Goode asked whether there was any danger of a fire. Obviously, the bomb would be constructed and detonated by the Bomb Disposal Unit, who supposedly knew what they were doing. And finally, Goode asked Brooks -- a former Army general and now the top City official on the scene -- his opinion of the plan. The idea was to destroy the bunker and nothing more, and supposedly his advisors knew the circumstances, and supposedly the police knew what they were putting together, and his advisors thought it was a good idea. Given these facts, we cannot conclude that Goode acted recklessly.

As mentioned above, recklessness is the minimum mens rea for most of the crimes under consideration. The "knowing" and "intentional" mental states have even more elements and requirements which must be satisfied. As Goode's behavior does not reach the

standard of "recklessness" as defined by law, his conduct also does not meet the more stringent "knowing" or "intentional" standards.

Goode's conduct is perhaps more accurately described by the statutory definition of criminally negligent behavior:

> A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and intent of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

As we noted above, however, negligence will not support a prosecution for any of the relevant possible charges except involuntary manslaughter (gross negligence) and criminal mischief (negligence). Prosecution on these charges is precluded because Goode's decision to drop the explosive device was not the direct cause of the ensuing deaths and destruction.

Many of the relevant possible charges (murder, involuntary manslaughter, aggravated assault and causing a catastrophe) require proof not only of recklessness but also of causation. Here, the harm relevant to involuntary manslaughter and criminal mischief charges -- i.e., death and unwarranted destruction -- was not the direct result of Goode's decision to drop the charge, but of Sambor and Richmond's subsequent decision to let the fire burn, and MOVE's concomitant decision to remain inside a burning house. Thus, the relevant issues are whether Sambor and Richmond's decision to let

the fire burn, and MOVE's refusal to exit a burning house, were foreseeable or whether they were superceding causes relieving Goode of criminal liability.

We have concluded that MOVE's refusal to exit a burning building may have been foreseeable to Goode, who knew that MOVE members would sacrifice their own children for their cause. We also have concluded, however, that Sambor and Richmond's decision to let the bunker burn was not foreseeable. Goode stressed to Sambor that he was concerned for the safety of all involved; he repeatedly claimed to have been relying on his Commissioners to effectuate a plan which would safeguard lives and he relied on his Commissioners to act as professionals. Goode did not even anticipate a fire, and had he anticipated one, he doubtlessly would have relied on his Fire Commissioner, who was present at the scene, to extinguish it immediately.

We have also been instructed that, even if Goode's conduct was otherwise criminal, it may have been legally justified under statutes permitting the use of deadly force in law enforcement under certain circumstances. (These statutes are considered in detail elsewhere in this report.) Because we did not conclude that Goode acted criminally, however, we found it unnecessary to determine whether his conduct was further justified by statute.

In sum, indictment of Goode for his approval of the use of the satchel charge would be warranted only if we could conclude that Goode acted with the requisite mens rea to establish criminal liability, and also that he could foresee (1) that a fire might

result, (2) that his Commissioners would let it burn even though they had equipment on the scene with which to extinguish it, and even though they knew there were children inside, and (3) that MOVE would remain inside and would keep their children inside. Additionally, we have been instructed that, even if these mens rea and causation issues did not preclude indictment, Goode's conduct nevertheless might be statutorily justified. Having considered all of the testimony we heard and having analyzed it according to the law outlined above, we concluded that Goode should not be indicted for the decision to drop the satchel charge.

In deciding whether indictments could be returned against Brooks for any of the relevant crimes listed above, we encountered all of the same difficulties presented with Goode: There is simply no evidence that he consciously disregarded substantial and unjustifiable risks. He did not foresee that a fire would result, and could not foresee the Police and Fire Commissioners agreeing to let a fire burn. Further, he, too, may be able to assert statutory justifications for his actions. Moreover, Brooks' criminal responsibility is even further attenuated than is Goode's: Brooks merely offered Goode his opinion of the plan (although it seems quite foreseeable that Goode would rely upon -- indeed, defer to -- his advice); he did not give the final approval.

Brooks had a lesser knowledge of the risks involved than Goode. He was not present at the planning meetings when the

gasoline cans were discussed, and testified credibly that he did not recall any discussion of the possible presence of gas on the roof. Although he knew that MOVE might have gasoline in the house, and although he probably knew that MOVE might also have explosives, he was assured that the satchel charge posed little or no danger of fire. Similarly, although he knew that there were children in the house, Powell assured the decision-makers (according to Sambor) that the charge would not harm the occupants, even if they were on the second floor. (Klein testified, however, that he thinks he told Sambor that "[the satchel charge] would stand the bunker up, drop it down on the sidewalk. If they survived the crash, they wouldn't be able to hear for a week, but they would probably live." If this testimony is credited, the satchel charge clearly posed a danger to anyone in the bunker. Indeed, regardless of what Klein actually said, it is only common sense that any charge capable of destroying or disabling the bunker would necessarily endanger anyone in the bunker. However, the use of force against MOVE members in the bunker -- felons using deadly force to resist arrest -- is arguably justified under the relevant statutes.)

From this evidence, and the absence of any evidence from which we could find that Brooks could have foreseen the decision to let burn any fire which did occur, we have concluded that no indictments against Brooks are warranted.

The decision whether to indict Sambor for his role in the decision to drop a satchel charge has been a difficult one. We have carefully considered several specific charges. We will discuss these charges and will also review additional factual allegations and additional legal principles relevant to the decision whether to indict for these crimes.

We have considered whether to indict Sambor for the crimes of arson, murder, involuntary manslaughter, causing or risking a catastrophe, conspiracy, criminal mischief, recklessly endangering another person, and solicitation or attempt to commit assault or murder, in connection with his participation in the decision to use the satchel charge. We have concluded that, as to each of these crimes, indictment is precluded by one or more evidentiary or legal impediments. Either the evidence does not establish that Sambor acted with the requisite mens rea, and/or Sambor's advocacy of the satchel charge proposal was not the legal cause of the harm which resulted, and/or his conduct, if on a prima facie level criminal, was nonetheless subject to one or more valid statutory defenses.

First we discuss whether Sambor's actions demonstrate a criminally culpable state of mind. As we noted before, the minimum mens rea (state of mind) required for proof of all but two of the above-listed crimes is recklessness. The evidence does not establish that Sambor acted recklessly, i.e., that he consciously disregarded a substantial and unjustifiable risk. Furthermore, as is described below, the assurances given to Sambor about the

limited effects of the satchel charge bar a finding that he "knowingly" or "intentionally" used the charge to cause harm.

Sambor attempted to disclaim any awareness of the risk posed by gasoline cans on the roof. He denied any knowledge of the cans, telling us that up through May 13, 1985, he had no information that there might be gasoline on the roof. However, Tursi, Benner, McLaughlin, Revel, Marandola, Teti, Tiers, Scipione and Powell all testified that, at the May 11, 1985 meeting with Sambor, the presence of a gasoline can or cans on the roof of the MOVE compound was discussed. (Police were concerned that the gasoline could be dangerous if an armored personnel carrier were used, or if shape charges were used on the roof.) Sambor did, however, tell us that he thought that the presence of gasoline would pose a significant risk. He testified that he did not think anyone knew the cans were on the roof because "If [we] had, I think that would have certainly changed our concepts of the operation."

We do not credit Sambor's claim that he was unaware of the gasoline cans and we do not credit his further statement that such knowledge would have changed his concept of the operation. When the risk he implicitly acknowledged actually materialized -- i.e., when the gasoline ignited -- Sambor did not immediately order that the fire be extinguished, but instead adopted a calculated strategy to let it burn. Clearly, far from regarding the ignition of a fire as a risk which must be avoided, Sambor regarded it as an asset which could be used to accomplish what the charge had not. From this we can draw four possible

conclusions: (1) Sambor regarded the fire as an insubstantial risk, his later testimony notwithstanding (because the Fire Department could extinguish any roof fire which occurred), (2) he regarded it as a substantial but justifiable risk, (3) he regarded it as a substantial, unjustifiable risk (in which case his conduct was criminal), or (4) he was not aware (conscious) of the risk and so made no assessments of whether it was substantial or justifiable (that is, the possibility that a fire might ensue simply did not occur to him).

Of these four possible conclusions, the evidence as we find it most clearly supports the first or second conclusion. We simply find no evidence to support the third conclusion (the only conclusion which implicates criminal conduct). As for the fourth conclusion, we find that the evidence, while not inconsistent with this conclusion, does not affirmatively support it. For these reasons, we find that Sambor did not consciously disregard the risks posed by the gas cans on the roof, and did not know or intend that the eventual harm would result.

We further find that Sambor did not consciously disregard any of the three remaining risks we noted initially. Although Sambor had a knowledge of the facts from which he could have formulated an awareness of the risks, the evidence suggests that he had no such conscious thought processes. Sambor admitted knowing that there was gasoline in the house. Additionally, Sambor believed that there might be explosives in the house: The arrest and search warrants which Sambor executed alleged that MOVE

possessed unlawful explosives and Sambor stated at the May 11, 1985 meeting that MOVE might blow up its own house. Finally, we have concluded that Sambor knew that the satchel charge might propel debris into the house, because a stated objective of the charge was to create a hole through the roof. Nonetheless, Sambor's testimony, neither corroborated nor contradicted by Brooks, Richmond, Powell or Klein, negates a conclusion that he acted recklessly with respect to risks posed by the possibility that the charge would fall into the house or propel debris into the house, touching off an explosion or otherwise killing or injuring people.

Sambor testified that Powell assured him that the device would be a minimal charge designed specifically to achieve the objectives of dislodging the bunker and creating a hole in the roof. Sambor said that Powell predicted that the charge would present little or no danger to the occupants of the house, even if they were on the second floor. Sambor also testified (as did Brooks and Richmond) that Powell told them that the possibility of fire "was virtually non-existent, because this stuff had such a low potential for creating fire." Lastly, Sambor claimed that he thought that any gasoline in the house would have been kept near the generator, which he assumed was in the basement. This testimony is corroborated by Sambor's instruction that the police posts were not to be notified; had Sambor intended or realized that explosives inside might detonate, he would have evacuated the nearby police. Thus, there is no substantial, reliable

evidence from which we could conclude that Sambor acted intentionally, knowingly or recklessly.

In assessing whether Sambor acted with a criminally culpable state of mind, we have carefully considered certain additional evidence: allegations by Klein that Sambor told him to put shrapnel in the bomb. Klein testified that as he, Powell and Sambor were walking towards the helicopter, Sambor pulled him aside and told him to "use frag and shrapnel [in the satchel charge] if you have to, to get them mother fuckers." (Klein explained to us that the addition of "frag" would make the charge anti-personnel but, because the target was the bunker, adding frag or shrapnel actually would only cut down on the charge's effectiveness.) Klein said he repeated Sambor's comment to Powell. According to Klein, Powell asked what frag would do. Klein answered "Nothing to a bunker," and Powell said "Don't do it then.... Don't worry about it. What he don't know won't hurt him."

Powell testified to a similar recollection of this conversation. He said that after the decision was made to use the satchel charge, he approached Sambor and told him that they did not have any C-4 and so would use Tovex. Sambor replied "Billy Klein knows what I want." Powell went over to Klein:

> ... I said [to Klein] "What do you mean, you know what he wants?" He said, "He told me not to tell nobody." I said, "What the hell are you talking about?" He said, "He said he wants plenty of frag." And I said "No frag." My thinking is that I'm dropping this thing on the roof. The people in the MOVE house are protected, but the guys in Post Two and Three and Four and Five, they're exposed, these guys.

Sambor categorically denied instructing Klein or anyone else to include "frag" or shrapnel in the charge and further said that he would not use the word "frag." Moreover, Sambor said that he did not know Klein and did not even meet him until after Klein already had composed the satchel charges. In his account of the afternoon meeting at which the satchel charge was discussed, Sambor said that Powell came to the meeting by himself and that he (Sambor) and Powell answered all of the questions about the satchel charge. Finally, he told us that, as far as he knew, Powell gave the instructions they had agreed upon to Klein. However, Brooks, Deputy City Solicitor Ralph Teti, and Brooks' body guard, Police Officer Louis Mount, all recalled Klein's presence at and participation in this meeting. (Indeed, Klein evidently was somewhat unforgettable: Teti described Klein as the police officer wearing Bermuda shorts and a baseball cap, smoking a cigar.)

We do not credit Sambor's claim that he did not even meet Klein until after Klein had constructed the charge. However, having observed Klein's demeanor as he testified and having considered his testimony, we have likewise rejected as uncorroborated and insufficient to come to a conclusion of fact his allegations that Sambor instructed him to put frag in the charge.

Because one of the specific crimes which we considered -- involuntary manslaughter -- may be established on proof of a lesser mens rea than recklessness, that of gross negligence, we have also considered whether the evidence reviewed above

establishes that Sambor's conduct in suggesting and pursuing the use of a satchel charge was grossly negligent. We have been instructed that the Crimes Code defines negligent conduct but fails to give a specific definition of grossly negligent conduct. We have been told that, under the Crimes Code:

> A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and intent of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

We have concluded that Sambor should have been aware that a fire -- indeed, a greater one than initially occurred here -- could have resulted from the use of the satchel charge. The charge was designed to blow a hole in the roof, and there allegedly were incendiary materials inside. This was potentially like throwing a lighted match on a wood pile. Sambor should have perceived the risk, and, while we find that his conduct does not rise to the level specified in the involuntary manslaughter statute, we find that he was negligent not to have done so.

However, no catastrophic explosion or immediately inextinguishable fire did result. Instead, only a small roof fire ensued. The use of the satchel charge itself thus did not result in death, injury or unjustifiable destruction.

We have examined in detail whether Sambor's conduct with respect to the decision to drop the satchel charge was the legal

cause (i.e., the cause under the law) of the harm which resulted. As discussed above, we were instructed that, in order to be the direct cause of a result, a person's conduct must be a direct and substantial factor in bringing about that result. A person whose conduct is such a direct cause may be criminally liable even though there are other direct causes. There can be more than one direct cause. But a person's conduct is not a direct cause if the intervening acts of others, or the actions of the victims themselves, or the occurrence of another event, plays such an independent, important and overriding role in bringing about the result, compared with the first act, that the first act does not amount to a direct and substantial factor in bringing about the result. The conduct need only start an unbroken chain of events. However, whether the conduct of others relieves the original actor of liability for his first act also depends on whether the intervening conduct was foreseeable to the original actor.

In deciding whether Sambor's actions were the direct cause of the resulting harm, and whether that harm was legally foreseeable, we considered, among other things, whether Sambor knew (1) that there was gasoline on the roof of the MOVE compound; (2) that there may have been explosives inside the house; (3) that the Fire Department would have difficulty fighting any fire because they could not go inside the house; (4) that the persons on the scene would not immediately extinguish the fire; (5) that the Fire Commissioner could misjudge his Department's ability to fight the fire if allowed to burn; and (6) that MOVE was likely

to remain in a burning house and/or to hold its children in the house.

Here, as discussed earlier, the direct cause of the resulting harm was not the decision to use a satchel charge. Rather, the death, injury and destruction which occurred resulted from the failure to extinguish the roof fire and MOVE's decision to remain inside the burning compound and to keep their children inside. We have concluded that, although the possibility of fire was foreseeable (whether from the ignition of gasoline, the ignition of explosives or simply the ignition of roofing and bunker materials), the possibility that the fire would rage out of control, killing people in the basement, was not foreseeable. This entire issue, however, is more appropriately discussed in the context of analyzing whether Sambor is criminally liable for his part in the decision to let the fire burn, which we have done in Part VIII. We conclude that Sambor's promotion of the satchel charge proposal was not the legal cause of the harm which occurred here.

Because we concluded that the evidence did not establish the elements of the relevant crimes, we did not need to give detailed consideration to whether Sambor's conduct, if arguably criminal, was nonetheless defensible under one of the statutory justification provisions, including mistake and use of force in law enforcement. Therefore, we will only briefly review these two statutory defenses. (The evidence does, however, establish the elements of

one crime -- criminal mischief -- and so we will analyze in more detail the statutory defense relevant to this crime.)

One possible defense is the defense of mistake. If an actor is ignorant of or mistaken about a fact, and there is a reasonable explanation or excuse for that ignorance or mistake, his ignorance or mistake is a defense if it negates the state of mind which must be proven. Thus, if Sambor was ignorant of, or mistaken about, the risks inherent in the use of the satchel charge, he could not have had the requisite mens rea for any crime.

Another relevant defense is the statutory provision for the use of force in law enforcement. Under the statute, the use of the device was an arguably appropriate use of force by the police, who were trying to make lawful arrests in the face of deadly resistance. Generally, a police officer may use any non-deadly force he believes necessary to make an arrest, or to defend himself or another from bodily harm while making that arrest. Deadly force -- that is, force readily capable of causing death or serious bodily injury -- may be used if the police believe that it is necessary (1) to prevent death or serious bodily injury to themselves or another; and (2) to prevent resistance or escape which would avoid the arrest, or if the person sought has committed a violent felony, is trying to escape, and has a deadly weapon, or is likely to kill or seriously hurt someone unless quickly arrested.

The defense of justification is especially important with respect to the crime of criminal mischief. Criminal mischief can be proven where the actor negligently damages tangible property

of another in the employment of fire or by explosion. However, we have concluded that the evidence establishes only that Sambor intended to destroy the bunker, which the City could have dismantled lawfully had it pursued its civil remedies and which Sambor could legitimately destroy pursuant to the statutorily authorized use of force to effect arrests. The evidence, therefore, cannot support the lodging of a criminal mischief charge against Sambor.

In sum, for the reasons set forth above, we have concluded that the decision to let the fire burn, not the use of a satchel charge, was the root cause of the loss of life and property which occurred on May 13, 1985. That decision and its legal consequences are discussed in the next chapter of this report.

VIII. THE DECISION TO LET THE FIRE BURN

In the previous chapters we discussed various tactics used to attempt to force MOVE out of 6221 Osage Avenue, including dropping explosives on the roof. In this chapter we examine the last of those strategies, the decision to let the fire resulting from the satchel charge burn the bunker.

The evidence, considered in great detail below, establishes that, at about 5:27 p.m., Goode watched the explosion of the satchel charge on television in his City Hall office. Brooks, Sambor and others watched from a ninth-floor balcony at the Geriatric Center at 63rd and Walnut Streets, while Richmond watched from Osage Avenue.

Shortly after the explosion a small roof fire became evident. Sambor and Richmond subsequently made an on-the-scene, tactical decision -- which they did not communicate to Brooks or Goode -- to permit this fire to burn. They hoped the fire would accomplish what the charge had not: The destruction of the bunker. The fire did eliminate the bunker, but not in the manner intended. Instead of burning the bunker above the roof line, the fire weakened the roof and, at 6:21 p.m., the flaming bunker fell into the second floor of 6221. The moment that the fire spread to the interior of the house it could no longer be fought without grave risk to fire fighters.

Although the Fire Department could have easily extinguished a roof fire with its squirts, it could only fight an interior

fire with hand-held lines capable of extinguishing the fire at its base. Spraying water on the fire from the overhead squirts would only exacerbate the interior fire by forcing it down through the house and into adjoining properties. Extinguishing the blaze with hand-held lines, however, was too risky because MOVE members might shoot at fire fighters as they had in 1978. This significant danger prevented the Fire Department from actively fighting the fire for several hours. In that interim, the Fire Department did attempt to contain the fire to the MOVE compound, but was not successful. MOVE members and children remained in the house for nearly two hours as the fire grew in intensity. Ultimately, only Ramona and Michael escaped. The others apparently chose to remain inside, or left and then returned to the compound, where they died.

In this chapter, we first review the evidence of how Sambor and Richmond made the decision to let the fire burn. Because no determination of their criminality is possible without reference to how much each knew and when, we also examine evidence concerning the progression of the fire. Using the testimony of numerous witnesses as well as video tape footage taken that day, some of which was time-coded, we chronologically discuss the fire's progression. Further, from the testimony of an expert in the cause and origin of fires, we have determined at what point the fire became out of control. Having thus established a factual framework, we then examine this evidence under the relevant law to determine whether Sambor or Richmond acted criminally. We have

not considered whether anyone else is criminally liable because we have concluded from the evidence that no one else was involved in the decision to let the fire burn.

As with the decision to use the satchel charge, we have encountered significant factual questions and problematic legal issues in determining whether Richmond or Sambor acted criminally in permitting the bunker to burn. We have concluded that they did not. Sambor intended to use the fire to destroy the bunker. He relied on Richmond's judgment that the fire could be controlled. Richmond gave that opinion not knowing, even as he spoke, that the fire was imminently uncontrollable or already out of control and never anticipating that, if the fire did grow, MOVE would remain inside. The law and facts underlying these conclusions are set out below in detail.

The accounts of these events offered by Richmond, Sambor, Brooks and Goode vary greatly. Most of the critical facts, however, are not in dispute. For purposes of comparison and completeness, the testimony of the main actors regarding the crucial evening period is described below.

Richmond told us that he was standing on 62nd Street north of Osage Avenue at 5:27 p.m. when the satchel charge was dropped. He testified that, a few minutes after the explosion, an aide said that he thought that there was a fire on the roof. Richmond went to the WCAU-TV Channel 10 van at 62nd and Pine where a camera had been mounted and raised on the van's mast. On the mast-camera

monitor in the van, Richmond could see light smoke rising above the MOVE compound's roof. (He could not actually see the roof because parapets on the adjoining property blocked his view.) Richmond made several trips between the van and the north side of Osage Avenue, speaking with Deputy Fire Commissioner Frank Scipione and ordering the placement of fire-fighting equipment when he was not monitoring the fire from the van.

Richmond said that, at approximately 5:45 p.m., there was a minor fire visible. He and Scipione ordered Engine 57 to be dispatched to the scene. Richmond also instructed Scipione to ask the police what they wanted to do about the fire, which at that time was small and could be extinguished easily by the squirts. Richmond did not order the squirts on because he thought that the police were still trying to get onto the roof so that they could insert tear gas. He feared that if he directed the squirts toward the bunker he might wash officers off the roof. He was not told that police would not be put on the roof. After speaking with police, Scipione told Richmond that they did not want any action taken against the fire at that time.

Scipione corroborated Richmond's testimony that the police instructed them not to fight the fire at that time. Additionally, two fire fighters testified that they heard a communication to this effect relayed over the F-4 radios. Inspector John Tiers, however, the police officer with whom Scipione spoke, denied giving any such instruction. After carefully considering the varying

recollections of this event, we have concluded that Scipione and Richmond's recollection is the most accurate.

Scipione told us that he relayed Tiers' message to Richmond at about the time that Engine 57 arrived, which other evidence shows occurred at 5:57 p.m. Scipione further testified that he subsequently went back to Tiers and asked whether he could turn the water on yet. (Tiers said, however, that he had only one conversation with Scipione.) Tiers told him that "My Commissioner and your Commissioner are going to meet in two minutes to decide what to do." Scipione radioed Richmond, telling him that he had spoken again with Tiers, who had said that Sambor was going to meet with him (Richmond) in two minutes and decide what to do. At that moment, Scipione saw Sambor coming up 62nd Street. Sambor asked Scipione where Richmond was, and Scipione pointed to Richmond, who was on 62nd Street north of Osage Avenue. Sambor went to Richmond and the two spoke, although Scipione was too far away to hear what they were saying.

Richmond had a similar recollection of Scipione's radio call about the meeting with Sambor. Richmond said that he left the van at approximately 6:11 (a time he determined by later viewing Channel 10's time-coded footage of the fire and noting the frame depicting the fire as he recalled it when he left the van). He met Sambor two or three minutes later on 62nd Street north of Osage Avenue. Richmond told us that, although he could not recall Sambor's exact words, Sambor

> essentially [said] it was important to them ... to secure the higher ground and to let

> the bunker burn to eliminate that higher ground advantage.

Sambor then asked whether Richmond could control the fire on the roof if they let the bunker burn. Richmond responded affirmatively.

According to Richmond, Sambor then crossed Osage Avenue and spoke with Scipione. Minutes later, the squirts were turned on. (Scipione explained that, after speaking with Richmond, Sambor asked Scipione whether he could put water on the roofs of the houses "on either side" [of the MOVE house]. Scipione said he could, and Sambor said "Well, do it." Scipione then radioed Deputy Fire Chief Walter Miller and instructed him to turn on the squirts.) The squirts were subsequently shut off because the resultant smoke prevented surveillance by the police, who were expecting MOVE to leave the house at any time. This sequence of turning the squirts on and off was repeated a few times.

Just before the squirts were turned on, Richmond said that he looked at the MOVE house and realized "we had a problem on our hands." Richmond recalled saying to Scipione that there was a good chance that they would lose the block. There was nothing they could do, however. Because the police still expected MOVE combatants to emerge from the compound, the Fire Department could not access the streets. Although the Fire Department repeatedly played the squirts on and off the roof, it could not use hand-held lines to extinguish the fire.

Sambor, Brooks, Deputy City Solicitor Ralph Teti, Licenses and Inspections Commissioner James White, and Police Officer Louis Mount (Brooks' bodyguard), among others, watched the helicopter drop the charge from a ninth-floor balcony at the Geriatric Center on 63rd and Walnut Streets. Sambor testified that after the device exploded he realized that it had not destroyed the bunker. He could not see whether it had made a hole in the roof. Instead of discussing with Brooks what to do next, Sambor went to Post One (6218 Osage Avenue) and then went to the corner of 62nd and Osage. While there, Sambor said he received two radio calls from Brooks. In the first, Brooks said there was smoke coming from the compound. Sambor could not see any. In the second, which Sambor estimated occurred about 6:00 p.m., Brooks said there was fire. Sambor now could see smoke but not fire. Shortly after receiving the second call, Sambor saw Richmond on 62nd Street and spoke with him:

> [We] started out just very briefly talking about things in general. And eventually we got to the point where I asked him if we allowed the fire, which at that time was still not really observable, if we allowed the fire to burn to get the bunker, could he control it? And Bill [Richmond] responded in whatever way he responded indicating yes, he could control it.

Sambor said that, at the time of this conversation, he still could not see any fire and claimed that he did not know the extent of the fire or where it was located. Sambor continued:

> When I had part of this conversation or shortly thereafter, Bill and I had discussed the fact that water would be -- I think it was my own suggestion that water be put on

> either side of 6221 to see that the fire did not spread beyond 6221.
>
> * * *
>
> And shortly thereafter, I don't know whether he gave the order specifically, or however, but I do remember water going on.

Sambor said that within a "very, very short time" after the conversation, the squirts went on. Because the water caused visibility problems for the police, however, it was shut off. In the next half hour, the water went on and off several times.

Sambor said he did not inform Brooks of his decision to let the bunker burn before receiving a third call from Brooks:

> I just didn't. But I can't give you a reason why I didn't. It wasn't a matter of not wanting to or anything else or trying to eliminate the chain of command. I just never got around to it before he got me on the radio.

Sambor claimed that, at about 6:10 p.m., he received the third radio call from Brooks, who wanted to know why the fire was not being extinguished. Sambor explained that he and Richmond had agreed to let the fire destroy the bunker, and added that use of the squirts was causing visibility problems. Brooks told him that the fire had done what Sambor wanted it to do, and that he should get the water back on. Sambor said he relayed the order either to Richmond or Scipione or one of the Fire Department commanders and then returned to Post One. He was inside Post One for a few minutes. During that time he saw that the second floor was on fire, but no water was on. He left to find out why the fire was not being fought. Within a few minutes of the time he reached 62nd and Osage Streets the water already had been turned

on. Again, he said, there was discussion about the inability of police officers to see.

Finally, Sambor testified that he spoke with Brooks at about 7:00 p.m.:

> Well, the Managing Director saw me. He was visibly upset. And his question to me was, "Why didn't he put the fire out sooner?" And I told him at that time that it was only fair for him to direct that question to the Fire Commissioner and not to me. I could not answer that. I couldn't or wouldn't, because I wasn't prepared to tell him the statements that the Fire Commissioner had made several times during the day, that he wasn't going to put his personnel in any danger [of being shot by MOVE as they had been in 1978].

Recently, months after testifying before us (and almost three years after the event itself), Sambor sent us a proffer of his "best present recollection" of conversations with Brooks on the evening of May 13, 1985. In it he said that he and Richmond made their decision to let the fire burn within minutes after Sambor's first conversation with Brooks. He also said that five or ten minutes after the first call, Brooks called again and Sambor told him of the plan to let the fire burn. This second call came very shortly after 6:00 p.m. -- i.e., when the fire still could have been extinguished by the squirts. In a third call five or ten minutes later, Brooks asked why the water was not on, noting that the objective has been accomplished. Thus, Sambor's "best present recollection" now implicates Brooks in the decision, implying that he tacitly authorized the tactical use of fire. We do not credit this eleventh-hour proffer.

Brooks' testimony differed markedly from Sambor's except as to the critical question of who decided to let the bunker burn. Brooks was among those who watched the explosion from the ninth-floor balcony of the Geriatric Center. Although his view was partially obscured by a large tree, with binoculars he was able to see that the charge had not destroyed the bunker, but had made a hole in the roof. He recalled that five or ten minutes after the explosion, he heard a radio report (he thought from the state troopers in the helicopter) of "No fire." Although it is unclear what prompted this comment, the initial dust and smoke from the debris may have led the person transmitting (probably a Stake Out officer in a rooftop position) to investigate. As the radio reports continued, Brooks grabbed his bodyguard's radio and rebutted "Yes, there is a fire." Brooks had seen smoke; after he relayed this message he saw flames three or four feet high near the bunker. He then became concerned and tried unsuccessfully to reach Sambor:

> I stood there, waiting for water to come on or something to happen, and ... I saw none of that happening. Then, I began to call Commissioner Sambor on the radio, and I tried and tried and tried, and my police officer [Mount] tried and tried and tried for an awful long time.
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> * * *
>
> [T]he longer we tried on the radio, the greater the fire got. And by now, it was on the bunker and [had] begun to engulf the bunker.

Brooks estimated that he reached Sambor approximately fifteen minutes after his initial efforts to do so. (Although Brooks had

estimated in his MOVE Commission testimony that this conversation had occurred at 6:00, in his testimony before us, after viewing time-coded Fire Department logs and other materials, he changed that estimate to sometime after the bunker had been neutralized.) By then, the fire was "all over the bunker." Brooks could not see the front of the house from the balcony and thus could not determine whether it, too, was on fire. Brooks ordered Sambor to extinguish the fire:

> I said, "You've accomplished your mission. Why don't you put out the fire? What are you doing?", you know, two or three statements of that nature. And he talked about wanting to destroy the bunker some more and whatnot, and after relatively short -- back and forth on the radio, I said, "You've accomplished your mission. Put out the fire." And that was the end of that conversation, and I think he understood that.

After this conversation, Brooks was informed that Goode wanted to speak with him. (Goode's police officer, Lieutenant Fred Ragsdale, had called Mount and asked him to have Brooks telephone Goode.) Brooks went back inside the Geriatric Center and called Goode. This was Brooks' first conversation with Goode after the explosion. From M-band radio time logs showing that Ragsdale attempted to reach Mount at 6:25 p.m., Brooks estimated that this conversation with Goode occurred at about 6:27-6:29 p.m. Goode told Brooks that he could see the fire on television and it was bad, and asked him why he had not put out the fire. Brooks replied that he had just given that order to Sambor. Brooks specifically testified that he never had any conversation with Goode where either of them indicated that fire would be used to destroy the bunker.

Brooks then went back out on the balcony. The squirts came on and then went off, and Brooks again tried to reach Sambor. When he could not reach him after trying for several minutes, Brooks went to the scene to have the fire extinguished. After reviewing television footage showing Brooks' car arriving simultaneously with Engine 24 and from examining Fire Department logs showing that that Engine was dispatched at 6:53 p.m., Brooks estimated, contrary to his earlier MOVE Commission testimony, that he arrived on the scene shortly after 6:53 p.m. Brooks first found Richmond on Pine Street and then found Sambor on 62nd Street. At this time the fire had spread to the roofs of at least three adjacent houses. Flames were visible from the north side of Pine Street. Brooks testified that Richmond updated him about every five minutes: "We've lost three houses now ... we now have lost four houses...." In addition to briefing Brooks on the fire-fighting activity, Richmond told him that fire fighters were not going directly to the MOVE house to extinguish the fire because they were concerned about being shot. Brooks was also informed that no one had come out of the compound. Brooks told us that he thought that MOVE already had escaped into the tunnels they were rumored to have. Finally, Brooks told us that Mount informed him that Goode was trying to reach him, and Brooks updated the Mayor three or four times by phone from a house on Pine Street as to the status of the fire and whether MOVE members had come out of 6221 during this period.

Goode did not participate in the decision to let the bunker burn; in fact, he did not even know about it until the following day. While review of the evidence concerning his actions is thus not necessary to resolve the question of whether he is criminally liable, a brief description of the Mayor's management of the crisis is illuminating.

Goode and members of his staff watched the explosion on a television in the office of his Chief of Staff, Shirley Hamilton. Goode testified that from 5:30 to 6:30 p.m. he went back and forth between his office and Hamilton's office. He watched Channel 10 continuously, either in his office or Hamilton's, except to speak briefly on the phone with various people. When he could see no fire-fighting activity, Goode said he became concerned about the fire and called Brooks, ordering him to put the fire out.

Goode has repeatedly stated publicly, both before and after testifying, that he made this call at or before 6:00 p.m. We have found, however, that he did not call Brooks until 6:25 p.m., after the bunker had been destroyed and after the fire in 6221 had become uncontrollable. Using the chronology prepared by Brooks, Sambor and Richmond on May 16, 1985, as well as his own memory, Goode had testified before the MOVE Commission that he gave Brooks the order to extinguish the fire at 5:55 p.m., about five minutes after the fire was visible on the television broadcast which he was watching:

> ... I saw initially a small fire on the roof. I saw what appeared to be some water coming in. I determined later that was not water at all, that was basically a kind of snow on my

> television screen. After about five minutes of watching that I indicated to my office, "Get Leo Brooks on the phone." At some time close to 6:00 p.m. that day I gave my first order of the day, which was to Leo Brooks, which was put the fire out. He indicated to me at that time that he had already given that order two minutes earlier.

Goode ultimately admitted before us that it was not a "small" fire but a "serious" fire when he finally called Brooks, and that he made the call later than 6:00. In testifying before us Goode initially estimated that he called Brooks "about 6:00 p.m., around that time." After reviewing time-coded M-band radio logs showing that Goode's first phone call to Brooks after the explosion was placed at 6:25, however, Goode conceded that it was an "absolute possibility" that he had called not at 6:00 p.m. but at 6:25, but maintained that he was "not firmly convinced of that at this point." When shown a time-coded Channel 10 tape showing the water coming on at 6:31 p.m., Goode acknowledged that he had seen this on television seven to ten minutes after he told Brooks to put out the fire. That would fix the time he gave the order at 6:20 p.m. Goode then admitted that he could have given Brooks the order "as late as 6:20."

Finally, Goode said that throughout the day, the delay from the time he asked someone to call Brooks until the time that Brooks got back to him varied from "two to ... twenty minutes, depending upon where [Brooks] was in relationship to a telephone." Asked how long the delay was from the time he asked Ragsdale to get Brooks until Brooks got back to him and he gave his order to extinguish the fire, Goode replied "It was not two or three minutes,

if you ask that question. It was not a quick return call. Whether it was fifteen minutes, I cannot recall at this time."

Goode's staff, present with him as he watched the charge explode and the fire progress, attested to his concern over the growing fire but offered no additional detail on the Mayor's actions that evening. Goode's bodyguard, secretary, press secretary and Chief of Staff all recalled only that, as the fire became more intense, Goode became upset that no efforts were being made to fight it and asked someone to call Brooks. None could remember the time at which this call was made. Hamilton said that, after the explosion, Goode's first attempt to reach Brooks occurred after the bunker had fallen in. Ragsdale could not remember whether the bunker had fallen through at that time, but did recall that the fire was "raging pretty good." Goode's press secretary, Karen Warrington, said that the fire was "raging" when Goode was trying to reach Brooks.

Other than this information, the people present with Goode during these critical moments could not recall a single thing that the Mayor did or said or with whom he spoke, if anyone. His secretary explained that she was not paying any attention to the Mayor (who was in the same room as she) because she was busy watching television:

> Q. Aside from this concern that the Mayor had regarding the fire, you cannot recall anything else that he said [regarding the fire]; is that right?

* * *

A. No, sir. I'm sorry. As I indicated, I was watching the television. I wasn't necessarily --

Q. But he's the man; he's making the decisions. You must have been curious to know what the decision was --

A. Well, I'm not involved in that process. I'm the Mayor's secretary. I'm not involved in management decisions.

Hamilton, the Mayor's Chief of Staff (a cabinet-level position) similarly testified that she did not recall Goode's actions or conversation during that critical time period because, although in the same room as the Mayor, she too was busy watching television:

Q. Did you ever overhear any conversation while he spoke on the phone in your office which indicated to you in some way what might be next?

A. No, I did not, because again, I was constantly watching the T.V. and as the Mayor would go to the phone, I sort of didn't listen to his conversation; I just continued to look at the T.V.

Warrington said that she went to Goode's office approximately thirty-six times on May 13, 1985 -- not to gather information but "just to leave my office." Although reporters were asking her throughout the day what was going to happen next, Warrington explained that she never asked Goode this question because:

[T]hat's such an obvious question and since the Mayor had the primary information and was talking to his people, that to ask that question is almost redundant.

Finally, she told us that she recalled hearing discussions about the fire while she was in Hamilton's office but had no specific memory of their content.

Because any determination of criminality necessarily involves consideration of who knew what when, we will briefly review the fire's progression and the evidence of how much each decision-maker knew at critical moments. In compiling this chronology, we have had the benefit of more information than any one person possessed at that time. We have reviewed all of the film taken that day (both that which was broadcast and that which was not aired), including film shot by Channel 10's mast camera at 62nd and Pine Streets, film taken by a Channel 10 cameraman who had hidden himself in a house on 62nd Street looking west on Osage Avenue, and footage taken from Post One by the Police Department's audio-visual personnel after the bunker had fallen in. We have also reviewed the testimony of witnesses who watched the progression of the fire from different angles: Fire Department Battalion Chief Carlo Allodoli, who reported his view from an Addison Street roof; Lieutenant Frank Powell, who photographed the fire from a helicopter at approximately 6:00 p.m.; and police in Post One, among others. Reference was also made to a chronology compiled (without the benefit of Channel 10's film) on May 16, 1985 by Brooks, Sambor, Richmond and Warrington. This was useful as a contemporaneously prepared recollection of individuals' actions, but was far from an accurate documentation of times and events. Finally, Charles

King, a nationally known fire expert, assisted us in reviewing all of this evidence and determining from it the cause and origin of the fire, the point at which it became uncontrollable, and the reasonableness of Richmond's assessment, at the time he made it, that the fire could be controlled. Despite all of this information, the conditions at the time and the distance from which the observations were made makes a definitive record of the fire's progress difficult.

Powell dropped the satchel charge, which missed the bunker and landed on the MOVE roof along the 6221/6223 party wall. The charge detonated at 5:27 p.m. Powell said he circled over the compound and saw a one-foot by two-foot hole in the roof at the point of detonation. The bunker was not damaged. Powell saw a cloud of dust, but no fire. He then went back to the Geriatric Center.

Smoke (distinct from the dust cloud immediately apparent after the explosion) was not visible from the street until about ten minutes after the explosion. However, wispy white smoke indicating an incipient fire was visible on the mast camera almost immediately after the explosion. Using video frames slowed to 1/32 of a second, King explained the cause of the fire:

> The heavy lumber and miscellaneous boards on the roof were reduced to kindling; the bomb shattered and tore the material, hurtling it in a westerly [sic] direction, where a can marked "gasoline" was located. Almost instantaneously, a vapor ignition could be seen coming from the area of this gasoline can. It could be observed that this kindling and

> broken wood was actually passing through the flame front created by the vapor ignition from the gas can. I believe that the ignition of these gas vapors was caused by any of the following: The gas can being punctured by some frangible material; blast pressure from the bomb; or the can was open at the time of the explosion, exposing the flammable vapor to the air. For any of the above reasons, a vapor ignition can have easily taken place.
>
> * * *
>
> [A]lthough the bomb can be viewed as the ignition source of this fire ... the actual heat and flame it generated was both limited and minimal. We can ... conclude that the presence of the gasoline cans on the roof (flammable combustible liquids) played a key role in the growth, spread and acceleration of this fire. The extension of the fire beyond the initial ignition point was due to the presence of these other combustibles, particularly the contents of the gasoline cans.

Wispy smoke was visible on the mast camera from the detonation until 5:36 p.m., when the film crew lowered the camera to change its batteries. King explained that this wispy white smoke was typical of a wood-burning fire. He further explained that the smoke seen in the first nine minutes of film indicated that the fire was incipient, meaning that without intervention it would either burn out of control or burn itself out.

No flame was visible until approximately 5:49 p.m. At that time, a Channel 10 live broadcast shows fire on the roof. Pete Kane, a Channel 10 cameraman hidden in a house on the scene, spoke to anchor Larry Kane on the air at 5:50 p.m., telling him that he could see flames and that there was a helicopter in the air. Powell and Officer William Klein were in the helicopter. After

being informed that there was a fire, they flew over the compound and photographed it at approximately 6:00 p.m. Powell recalled that the fire was not emanating from the hole caused by the charge but from the 6221/6219 party wall. He described the flames along the back of the bunker as the highest, about four feet high, although he wasn't sure.

King viewed Powell's pictures. He explained that the fire depicted in these photographs, taken at approximately 6:00 p.m., was a limited surface fire. Some of the combustible materials were burning, and the surface of the roof (asphalt, a petroleum distillate) was burning. The fire had spread to the roof of an adjoining property. The last in this sequence of photographs showed about six to eight feet of flame, just beginning to communicate to the area where the bunker was. King testified that this fire could have been extinguished by the squirts on Pine Street.

At approximately 6:00 p.m., Allodoli ascended a ladder on the northwest corner of 62nd and Addison Streets to act as a Fire Department spotter, directing the placement of water streams. Although he did not have binoculars, Allodoli could see the roof line of the MOVE house and approximately two feet below it. He observed that an area measuring approximately ten feet by ten feet was on fire between the two bunkers, and that the flames were about six feet high. Allodoli transmitted this information over the Fire Department radio band (F-4) to Deputy Fire Chief Walter Miller, who in turn transmitted it to Car One (Richmond).

Allodoli testified that Richmond acknowledged receipt of these transmissions. (Richmond testified that he did not remember receiving progress reports from Allodoli, although he did recall his dialogue with Allodoli concerning the direction of the water streams. In any event, King testified that the information Richmond was receiving from Allodoli was essentially the same information that Richmond would receive by viewing the mast camera.) Allodoli subsequently observed the Engine 57 deluge gun go on. He next reported to Car One that the bunker had collapsed, additionally stating that the second floor was fully involved. (The bunker collapsed in a matter of seconds, so that Allodoli missed the actual event in the time he took to shift his weight on the ladder.) The time-coded mast camera film shows that the bunker fell in at 6:21 p.m.

Allodoli further testified that, after the bunker had fallen in, he told Richmond that the fire was spreading to both sides and Richmond ordered that the squirts be directed on these properties. When the water hit the flames, a lot of smoke and steam was created which banked down into the street under the weight of the water and wind created by the squirts. Allodoli told us that Stake Out officers complained to him that they could not see. When Allodoli told them he could not order the water to be shut off, they radioed their complaints elsewhere, and the squirts were shut off. Finally, Allodoli told us that he could not say when the fire was out of control based on the limited information he had at the time.

At 6:31 p.m., Pete Kane told Larry Kane that water was now being poured on the fire; at 6:34 p.m. he reported that the Fire Department had just set up a hose at 62nd and Osage and was now fighting the fire from the front with one hose. Harvey Clark first reported seeing water from his location on Pine Street at 6:34 p.m.

The evidence reviewed above summarizes fire-fighting efforts in the critical time frame between the explosion of the satchel charge and the point at which the first significant efforts were undertaken to combat the fire. Fire-fighting efforts after 6:35 p.m. are discussed in Part X. We will now briefly summarize the critical testimony of King regarding the progression of the fire.

King first explained the path that the fire could be predicted to take:

> [W]hen you have a fire, it burns upwards. It does not burn down.... [T]he fire is seeking oxygen....
>
> * * *
>
> Q. Would the same principle apply with regard to the bunker on top of 6221?
>
> A. Yes. The bunker was made with heavy timber and railroad ties and deck plate. So if I were to have a fire on the roof, and if this were the bunker, as the fire communicated to the bunker, its tendency, as all fires do eventually, would have caught onto the wood, and it would have burned upward. The fire does not burn down. It burns upward.

King next explained the fire's actual progression. He viewed film shot by Pete Kane in which the fire has clearly progressed to the second floor of the house. King said the fire could not

Lieutenant Fred Endricat, the fire fighter in command of Engine 57, testified that he received a call to go to 6221 Osage Avenue. Engine 57 was dispatched at 5:53 p.m. and arrived at 5:57. Endricat set up a deluge gun on 62nd and Osage and, at Scipione's instruction, turned it on at about 6:05 p.m. He directed it against MOVE's roof but could not see whether the water actually hit there. Endricat estimated that the water was on for three or four minutes before Scipione ordered him to shut it off. About two to five minutes later, Scipione ordered it back on. After three or four minutes, Endricat again received an order to turn it off. Endricat said that this sequence may have been repeated once or twice again. Although Endricat was never told why he was ordered to shut off the water, he recalled hearing reports on his F-4 radio that the water was causing visibility problems for police.

Pete Kane testified, however, that he saw no water directed against the front of Osage at any time before the bunker collapsed, and did not see any evidence of water being sprayed from the back of the house. Moreover, the street depicted in film taken after the bunker collapsed appears to be dry, even while the fire is down to the first floor of the MOVE house. Possibly, this variance in the testimony is explained by Kane's other testimony that he may have left the second-floor window during this time period, and by the possibility that the heat of the fire could have caused the water to evaporate.

be extinguished with the squirts at this point, which he estimated was approximately 6:15 p.m. He explained that once the fire gets inside the cock loft (the area below the roof and above the ceiling of the highest floor), the fire cannot be extinguished by the squirts because they are unable to penetrate below the roof level. He further explained, however, that had the fire burned just slightly below the roof's surface, it could have been extinguished by the squirts. King said the squirts absolutely could not extinguish the fire once the bunker fell in at 6:21 p.m. Moreover, he explained that the squirts would have made the fire worse at that point, because their pressure would have caused the fire to spread. The only way to fight this kind of fire would have been to take hand-held lines into the building on fire. (Firemen were not even permitted onto Osage Avenue at that time, however, because they could be shot by MOVE members.)

After establishing this factual predicate, King was asked about the reasonableness of Richmond's belief that he could extinguish the fire visible to him on the mast camera at 6:11 p.m. King stated that this was a reasonable position to take. The fire visible at 6:11 p.m. was a surface fire of combustible materials with a "slight impingement on the bunker." King testified that, in his opinion, this fire could easily have been controlled by 2,000 gallons of water. (Each of the two squirts pumped 1,000 gallons of water per minute at one hundred pounds pressure.) King therefore concluded that, if Richmond said he could put that fire out with the squirts, he would consider that to be a "very

reasonable position at that time." He concluded that Richmond's judgment that the fire could be permitted to burn the bunker and still be controlled was a "fair call" even though there was some risk involved:

> I think that was a judgment call. I consider it a fair call. I'm sure the Commissioner has certainly a very good knowledge of how fires burn. I think it is reasonable to assume that that fire on the roof would spread to the bunker, and I think quite predictably it would burn up the side of the bunker. Although you would have a larger fire when we talk about volume, you still would have a fire on the roof and top of the roof, which means all those factors that he had at his disposal, his judgment would be, "I can still reach it with the water, and I can still put it out."
>
> * * *
>
> You think there is always a risk involved when you let the fire burn. I think that the extreme unusual situation, I think the emotional pressures that were brought to bear on firemen who were not use[d] to gunfire, who are not use[d] to staying up 18 hours, continuously, I think he made a judgment that he could control the fire as he saw it. I think that was his judgment. I believe he believed he could. And I also believe that there is a risk involved in that judgment.

King continued, however, assuming that Richmond did not know that gasoline might be on the roof, and explained that he did not think that Richmond would have made the judgments he did had he known about the cans on the roof and had he realized MOVE's commitment to stay in the compound:

> I looked at that film at 7:30 when they exited the house. And when I saw the amount of fire that was on that block, I could not believe that they still stayed in the house. I mean

> it was a resolve of willing to give up your life for your cause.
>
> ... [T]he city fire fighter does not run into that. It is just not a common experience.

Finally, we asked King to evaluate Richmond's failure to perceive that the bunker could fall through the roof and cause a fire which the squirts could not control:

> I think you'd have to look at it in two ways. I think, one, what you said is true. Maybe it was not thought through, if that is what you are stating.
>
> I think the other way of looking at it would be, at some point the Police Department would say, "Put the fire out."
>
> So it is a judgment call. If you let it free-burn, you should consider what do you do next. If you feel that there is a minimal involvement in it, and you would be permitted to use the equipment on hand, then your judgment is accurate.

Given this analysis, we attempted to summarize King's testimony:

> Q. And what you are testifying to, if I understand you correctly, is that Commissioner Richmond believed that the fire could spread to the bunker, neutralize the bunker, and still be controlled was a reasonable belief that he had and bad judgment that he exercised under the circumstances?
>
> A. That would be my testimony, yes.

Having reviewed the evidence of how the decision to let the fire burn was made, we will now analyze whether, under the law, this evidence warrants the lodging of criminal charges. We have previously discussed at length the elements common to all crimes:

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(1) an act (here, the decision to let the fire burn); (2) a result (e.g., the deaths of MOVE members and children inside the house); (3) a criminal state of mind associated with the act (e.g., recklessness); and (4) a direct causal relationship between the act and the result. (These prerequisites are more fully discussed in Part VII.) Each of these elements must be present before a crime may be found or charges brought. Individual crimes also have additional specific elements which must be present, together with the four elements listed above, before a crime may be found or charges brought.

Our inquiry regarding the decision to let the fire burn focused only on two people: Sambor and Richmond. Both men admitted that Sambor asked Richmond whether the fire could be controlled if it were permitted to burn the bunker, and that Richmond responded affirmatively. We have concluded that no one else was involved in this decision. Therefore, we discuss in detail only whether these two men acted criminally.

There is no basis for any charges against Goode for the decision to let the fire burn because there is no evidence that he had any part in or prior notification of that decision. Neither Richmond nor Sambor testified that they communicated their decision to Brooks or Goode, and we reject Sambor's belated written proffer that he did so. Brooks testified that in none of their discussions did either Brooks or Goode indicate that fire would be used to neutralize the bunker. Instead, Goode testified that he first learned of the decision to use the fire offensively on

May 14, 1985, at or prior to a press conference. It could be inferred from Goode's failure to call Brooks before 6:25 p.m. that he tacitly approved the decision; however, it is equally likely from the evidence presented that Goode assumed that his Managing Director and Police and Fire Commissioners were attempting to extinguish the fire. We have concluded that Goode's failure to take aggressive and immediate action to have the fire extinguished was not because he acquiesced in the decision, but because that was his management style that day.

Similarly, no detailed consideration of whether Brooks acted criminally is necessary because he did not participate in the decision to let the bunker burn. Indeed, despite some evidence which suggests that Brooks agreed with the decision to let the fire burn, we have concluded that he was not even informed of the decision until the bunker had been destroyed. The evidence which arguably implicates Brooks is both direct and circumstantial. First, while Brooks saw smoke at about 5:40 p.m., he did not order Sambor to extinguish the fire until 6:15 p.m. or later, by which time the bunker had been destroyed. Additionally, in a press conference held shortly after midnight on May 14, 1985, Brooks said that "we" thought that the decision to use fire to destroy the bunker was "appropriate." (Sambor's most recent recollection of events, as set forth in the proffer, of course, makes Brooks a party to the decision to let the bunker burn. We do not credit that proffer, however.)

Nonetheless, we have concluded that Brooks did not approve of or participate in this decision. Brooks testified that the fire visible to him from 63rd and Walnut Streets appeared significantly smaller than it actually was. He further testified that he initially took no action to have the fire extinguished because he assumed that the Police and Fire Commissioners were doing that. When it became apparent that they were not fighting the fire, he tried for some fifteen minutes to reach Sambor. When he finally contacted Sambor, Brooks asked him what he was doing and curtly ordered him to extinguish the fire. Further, Brooks explained that, in making his statement to the press, he was speaking not for himself but for other members of the Mayor's cabinet:

> What you're doing in a press conference is attempting to take all of the information that you have ... and you have to roll everything up into us, we, etcetera.... [Y]ou generally wouldn't say, well, the Police Commissioner did this and the Fire Commissioner did that.... I did ... say, "We thought it was appropriate," meaning that somebody in the operation thought it was appropriate, and that turns out to be true.... The bad choice in my case turns out to be the use of the word "we."

Finally, as already noted, we completely discredit Sambor's recent, revised version of events. We have no reason to believe that Sambor's memory three years after the event, on the eve of our decision with respect to possible criminal charges, is more accurate than it was closer in time to May 13, 1985. Having considered all of this evidence, we find credible Brooks' testimony that he had no part in the decision to use the fire to neutralize the bunker.

We now consider the far more difficult questions of whether either Sambor or Richmond acted criminally. The charges which we considered bringing against Sambor for his part in the decision to let the fire burn were murder, involuntary manslaughter, conspiracy, aggravated assault, recklessly endangering another person, arson by failing to control a dangerous fire, failing to prevent a catastrophe, causing or risking a catastrophe and criminal mischief.

The initial question in assessing Sambor's liability for these crimes is whether he acted with a criminally culpable state of mind in suggesting that the fire be permitted to burn. First, a significant factual issue which we considered in deciding if Sambor acted with a criminally culpable state of mind was whether he relayed Brooks' order to extinguish the fire. Failure to communicate this order (even after the bunker was destroyed) would be circumstantial evidence of criminal intent.

Neither Richmond nor Scipione substantiated Sambor's testimony that he relayed Brooks' order. In fact, Richmond vehemently denied ever receiving any such order from Sambor. (Although Richmond realized that the May 16, 1985 chronology indicated that he did receive the order, he discounted the chronology's accuracy. He said that he, Brooks, Sambor and Warrington prepared the chronology hurriedly and never used it.) .Likewise, nothing in Scipione's testimony suggested that Sambor relayed Brooks' order to him. (Rather, Scipione's testimony that Sambor directed him to put water on the roofs of 6219 and 6223 Osage Avenue merely

corroborates Sambor's testimony that, when he and Richmond agreed to let the bunker burn, Sambor suggested that they put water on the adjoining houses.)

We credit Richmond's testimony, both before this Grand Jury and before the MOVE Commission, that Sambor never relayed Brooks' order to him. As discussed below, all of Richmond's initial actions were directed at extinguishing the fire as soon as he had permission to do so. Moreover, Richmond was at the scene in a supportive role. He took no independent actions on May 13, 1985 other than to prepare to fight the fire as soon as he was permitted to do so. There simply is no basis for finding that Richmond received the order to extinguish the fire but ignored it. Similarly, we found Scipione to be a credible witness.

This does not necessarily mean, however, that Sambor failed to urge fire-fighting efforts. Evidence concerning the content and timing of conversations among Brooks, Sambor and Richmond after the bunker fell in is inconsistent and sketchy. Richmond did begin, soon after his discussion with Sambor, to take all of the fire-fighting action possible. Whether these efforts were pursuant to conversations with Sambor is unclear. Regardless of whether Richmond wished to extinguish the fire or merely to contain it, his fire-fighting activities would have been the same once the second floor was involved and the outside hoses could no longer be used. Even if Sambor had told Richmond to put the fire out, all that Richmond could do at that point, with MOVE still inside, was to play water on the adjoining houses. Hence, the

question of whether Sambor failed to relay the order, while disturbing, is not relevant to the spread of the fire or criminal liability.

Because recklessness is the minimum mens rea required to prove most of the crimes which we considered bringing against Sambor, we will first address that mental state. From the evidence we have heard, we have concluded that Sambor's conduct was not reckless. As explained earlier in this report, "recklessness" has a specific definition under the law:

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and intent of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation.

The risks here were substantial. Because the Fire Department could not fight an interior fire so long as MOVE members remained in the house, the moment that the fire progressed to the second floor it became uncontrollable. There is no evidence, however, that Sambor was aware of or understood this risk, let alone that he consciously disregarded it. To the contrary, he was aware that Fire Department personnel -- including the Fire Commissioner himself -- and fire-fighting equipment were at the scene. Most importantly, he specifically asked the Fire Commissioner whether the fire could be controlled if it were permitted to burn the bunker and was told that it could be.

Recklessness, as defined by the Crimes Code, also requires an assessment of the nature and intent of the actor's conduct and the circumstances known to him. Here, Sambor's intent was to disable the bunker, thereby destroying MOVE's tactical advantage and enabling police to pump tear gas into the house through the roof. This purpose was plainly lawful. The City could have dismantled the bunker had it pursued its civil remedies, and the use of tear gas to effectuate the arrests of MOVE members was a permissible use of force. Further, the "circumstances known to [Sambor]" included an awareness that MOVE had used the advantage gained by its bunker to successfully resist arrest. This advantage could be overcome by permitting the fire to do what the satchel charge had not -- and the Fire Commissioner assured Sambor that such a course of conduct was safe. Finally, although Sambor would not have known whether the gasoline can(s) on the roof already had ignited, we do not believe that this unknown appreciably changed his perception of the risk. A reasonable person would not necessarily believe that the gasoline would convert a fire which could be extinguished by the powerful squirts to one which could not. Additionally, Richmond and Sambor both attended the meeting at which the gasoline can(s) were discussed; thus, in asking Richmond whether the fire could be controlled, Sambor would have expected Richmond's answer to take the presence of gasoline into account. For these several reasons, we have concluded that Sambor did not act recklessly.

These reasons also mandate our finding that Sambor's actions do not demonstrate a mens rea of knowledge or intent. There is insufficient evidence that Sambor intended that the fire do anything other than destroy the bunker which he was empowered to destroy. Furthermore, given the assurances from Richmond, Sambor could not know the eventual result of letting the fire burn. Thus, we cannot find that Sambor committed any crimes for which the requisite mental state is intent, knowledge or recklessness.

We also considered whether Sambor acted negligently as involuntary manslaughter and criminal mischief require proof of gross negligence and negligence, respectively. As discussed in Part VII, negligence has a specific legal definition:

> A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and intent of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

Here, Sambor suggested letting the fire burn to accomplish a tactical objective. He consulted with the Fire Commissioner, asking him whether such a course could be pursued. As we concluded above, there is no evidence that Sambor was aware of the risk inherent in this plan (i.e., that the fire would spread into the second floor, where it could not be extinguished without exposing fire fighters to MOVE gunfire). We now further conclude that there was no reason why the Police Commissioner, relying on the Fire

Commissioner's professional judgment, should have been aware of this risk: A reasonable person would reasonably rely on an expert's opinion. The only question remaining for us then was whether Richmond's opinion was so unreasonable on its face that even a reasonable lay person would not have accepted it, but would have explored the answer further. Given all of the circumstances known to Sambor and which he assumed were known to Richmond, we cannot conclude that Sambor acted unreasonably in relying on the Fire Commissioner's response that the fire could be controlled. Thus, we find that Sambor was not negligent.

Because we found that Sambor lacked the requisite mens rea for any of the relevant crimes, we did not further consider whether the other elements of these crimes such as causation were established by the evidence, or whether other legal doctrines would affect our determination of criminality. While it is unnecessary to reach those questions, we note that many of the factors mentioned in our discussion of Richmond's conduct would also be applicable to charges against Sambor had they been brought.

We have also carefully considered whether Richmond acted criminally in telling Sambor that they could let the bunker burn and yet control the fire. We have concluded that Richmond's actions were not criminal.

As with Sambor, the charges which we considered bringing against Richmond for agreeing to let the fire burn were murder, conspiracy, involuntary manslaughter, aggravated assault,

recklessly endangering another person, arson, causing or risking a catastrophe, failure to prevent a catastrophe and criminal mischief. We have carefully considered whether Richmond acted with a criminally culpable state of mind, whether his actions were, under the law, the cause of the harm which resulted, and whether even a prima facie finding of criminality is precluded by other factors.

We began by considering whether Richmond acted with a criminally culpable state of mind. Again, because it is the most common mental state for the crimes listed above, we discuss recklessness first. We have concluded that Richmond did not act recklessly, that is, that he did not consciously disregard a substantial and unjustifiable risk. Richmond did possess facts sufficient to constitute knowledge of the risks. He was aware that there allegedly were explosives and gasoline in the house, and that there were cans on the roof marked "gasoline," which some people believed contained water because similarly marked cans containing water had been found on the roof of the Chester MOVE house. Although he was never told whether the children had been removed prior to the confrontation, at some point that day he had become aware that they had not. He knew that he had squirts and some other equipment on the scene, but that he had not come prepared to fight fires. Most important, he knew that he could not fight a fire conventionally because MOVE members probably would shoot at firemen as they had done in 1978. This last fact gave all the other facts added significance: Although the Fire Department could

have quickly brought in additional equipment, and although it ordinarily could have readily extinguished even an interior fire fueled by explosives, here the inability of the fire fighters to safely access the MOVE compound made any interior fire uncontrollable. This made the risk from an interior fire "substantial."

However, we have concluded that Richmond did not consciously disregard this risk. Asked whether, when Sambor suggested letting the fire burn, Richmond considered the possibility that the bunker might fall through the roof and into the second floor, causing a fire which could not be fought, Richmond replied:

> I did not factually follow that through. It was a unique kind of thing. It was something I had never seen in twenty-seven years. I guess in retrospect I certainly could have pursued it with Mr. Sambor.
>
> * * *
>
> I just did not follow through with that logic, no, sir.

Having carefully observed Richmond's demeanor and carefully considered all of his testimony, we find credible his statements that he simply did not consider the risks. All of Richmond's actions that day and his testimony before us concerning them (discussed below) support the conclusion that Richmond did not choose to pursue a course he believed to be dangerous, but rather made a terrible misjudgment in the haste of the moment.

The definition of recklessness requires not only an assessment of the nature of the risk, but also a consideration of the nature and intent of the actor's conduct. Richmond's testimony, corroborated by Scipione, showed that his intent was to extinguish the

fire. When Richmond was first informed that there was a fire, he immediately went to the Channel 10 van to view the roof. Within approximately ten minutes of when he received the first report of smoke, Richmond made several trips between the van and Osage Avenue to monitor the smoke. He also ordered that an engine company be dispatched to the scene and a deluge gun be placed on Osage Avenue. Richmond additionally instructed Scipione to ask police what they wanted to do about the fire, which was only a small roof fire that could be extinguished by the squirts. Shortly after being told that that the police did not want the fire extinguished, Richmond met with Sambor on the scene to ascertain what was to be done. Clearly, the intent of Richmond's conduct was to put out the fire.

The circumstances known to Richmond are also relevant under the recklessness statute in judging his conduct. There are two critical considerations. First, the Fire Department was present at the scene in an auxiliary role to the Police Department. At the May 11, 1985 meeting, Richmond was told that the Fire Department was to provide diversionary water, emergency medical services and ladders for Stake Out officers assigned to rooftop positions. He understood, pursuant to a pre-existing Managing Director Directive, that this was a police operation and that the Police Commissioner was in charge. At the time that Sambor said he wanted to let the bunker burn, Richmond felt that he was still in an auxiliary role to the Police Department. Significantly, Richmond testified that after the charge exploded he was never told that the police

had abandoned their plan to send officers to the roof of the MOVE house. He thought that if he unilaterally decided to turn on the squirts, the water might wash officers off of the roof. Further, when water was directed at the fire, police objected because it caused the smoke to bank down into the street, obscuring the vision of officers who were expecting MOVE combatants to exit.

Although Richmond's subordinate position did not compel him to give an opinion that they could let the bunker burn and still control the fire, the evidence concerning his understanding of the Fire Department's role is nonetheless probative of his state of mind. Richmond was not at the scene in his usual capacity. Accustomed to directing fire-fighting activities in non-hostile situations, he was not in charge on May 13, 1985 when he was asked to make a judgment about using fire as a tactical weapon in an armed confrontation. While we find his advice a tragic misjudgment, we also find that the very different and difficult circumstances in which he made his decision affect our determination of whether he acted with a criminally culpable state of mind. These conditions militate against a conclusion that he was criminally reckless.

The second circumstance warranting our consideration is the nature of the information available to Richmond when he offered his judgment that the fire could be controlled. Although any fire is potentially risky, at the time he acquiesced to Sambor's desire to permit the fire to burn, Richmond's impression of the fire was such that he thought it could be safely controlled.

King, an expert witness, testified that this was a reasonable conclusion. King told us that the fire which was visible before 6:00 was a small roof [not second-story] fire, whose smoke was consistent with that from burning wood [not petroleum products], and which could have been extinguished by the squirts on Pine Street. When asked whether Richmond's conclusion that the fire could be controlled was reasonable, given that the evidence showed Sambor and Richmond met sometime between 6:05 and 6:15, King replied that it was:

> What you have [on the mast camera] just prior to 6:11 ... [is] surface fire on the top of the roof.... If [Richmond] said he could put that fire out with the squirts, I could consider that to be a very reasonable position at that time.

More significantly, King termed Richmond's conclusion that the fire could consume the bunker and still be extinguished with squirts a "fair call." King testified that fire burns in an upward direction and generally he would expect a fire of a wooden structure like a bunker to consume itself without falling through the roof. King testified that even if the bunker were consumed by fire, and the roof were penetrated to some extent by the fire during that process, the fire nevertheless could have been extinguished by the squirts if it did not substantially involve the second floor. Thus, Richmond's belief that he could control and extinguish such a fire was a reasonable belief under the circumstances.

Finally, the statutory definition of recklessness requires consideration of the "standard of conduct that a reasonable person

would observe in the actor's situation" (emphasis added). Richmond was first notified of this operation less than forty-eight hours before it began. He was present during the extensive early morning gun battle and had been active on the scene since shortly after midnight when Sambor asked him to make a decision about the fire. Trying to explain why it did not occur to him that the bunker might fall into the second floor, Richmond attributed his critical oversight to extreme pressure and fatigue. He further recalled that:

> [Y]ou are talking about an extremely unusual situation.... [T]here is no way you can recreate Osage Avenue in this room. You cannot do it. When you looked up at that bunker, it was just the most awesome thing you ever saw in your life. To say you were scared, everyone was scared. There were bullets ricocheting over the streets, which was frightening, for a long extended period of time. I did not make the decision I normally make. I have a good history in Philadelphia. If I didn't make those decisions on that day, I feel maybe they cannot be excused, but they certainly should have taken some consideration to the environment that we were working in at the time.

Given all of these factors, we cannot say that Richmond acted recklessly.

There is even less cause to find that Richmond acted with the intent to commit a crime or with knowledge that a crime would occur. The evidence discussed above shows that the only action taken by Richmond was intended to destroy the bunker, a result which the City was authorized to achieve. There is no evidence that Richmond intended or knew that the fire would become

uncontrollable. Therefore, we cannot find that he acted with the criminal mental states of intent or knowledge.

While all of the above-referenced evidence negates the conclusion that Richmond acted recklessly, knowingly or intentionally, it does support the conclusion that his actions rose to the level of simple negligence, that is, that he failed to perceive a substantial and unjustifiable risk. As explained above, the evidence establishes both that the risk was substantial and that Richmond failed to perceive it; Richmond himself testified that the risk that the bunker might fall into the second floor and ignite a fire he could not successfully fight simply did not occur to him. The factors noted above -- the prolonged and extremely stressful situation in which Richmond found himself, his subordinate role to Sambor in this police operation, the minimal time in which key decisions had to be made, the extent of information on the fire's progress which was available to Richmond, and Richmond's inexperience in fighting fires in hostile situations -- all militate against finding that Richmond's conduct amounted to simple negligence. Nonetheless, we have concluded that the extreme nature of the risk made Richmond's failure to perceive it, even given these circumstances, a deviation from the standard of care that a reasonable person would observe in his situation. There is only one crime for which simple negligence is an adequate mental state: criminal mischief. For the reasons below, Richmond cannot be charged with this crime. Neither can he be charged with involuntary manslaughter because he did not have the requisite mens rea.

In addition to proving that a person acted with a criminally culpable state of mind, the person's conduct must also be shown to be the legal cause of the harm which followed before charges can properly be brought. As discussed above, in order to be the direct cause of a result, a person's conduct must be a direct and substantial factor in bringing about that result. A person whose conduct is such a direct cause may be criminally liable even though there are other direct causes. There can be more than one direct cause. But a person's conduct is <u>not</u> a direct cause if the intervening acts of others, or the actions of the victims themselves, or the occurrence of other events, play such an independent, important and overriding role in bringing about the result, compared with the first act, that the first act does not amount to a direct and substantial factor in bringing about the result. The conduct need only start an unbroken chain of events. However, whether the conduct of others relieves the original actor of liability for his first act also depends on whether the intervening conduct was foreseeable to the original actor.

Of primary importance was whether MOVE's refusal to leave a burning building was a superceding cause relieving Richmond of responsibility. Probably more than any other official on the scene, it would have been hard for Richmond to imagine anyone remaining or forcing children to remain in a burning building. In Richmond's long history with the Fire Department, he had not encountered a situation like this. In his experience, people fled burning buildings, only returning to them to rescue their

children; people did not remain inside and certainly did not keep their children inside. We find that Richmond could not foresee that MOVE members would remain inside and keep their children with them. We further find that this intervening action precludes criminal liability.

Two other factors must also be noted in substantiation of our decision not to bring charges. First, at the time that he made his conclusion that the fire on 6221 was limited to the roof, Richmond had several sources confirming this information, including his own observations of the mast camera monitor and observations by Battalion Chief Allodoli who was watching the fire from 62nd Street. What he did not know was that the camera's depiction of the location and size of the fire was deceptive. King testified that Richmond's reliance on this unfortunately erroneous information was "very reasonable."

Lastly, it is entirely possible that the fire was so advanced by the time that the Sambor/Richmond conference occurred, that nothing could have saved 6221 even if a different decision had been reached. As King testified, the squirts probably could not have extinguished the fire at 6:15 p.m., which was probably the time that Sambor and Richmond met. Thus, Richmond's decision may have been irrelevant.

All of the above considerations, particularly the intervening actions of MOVE members, would further preclude Richmond's liability for involuntary manslaughter. As to criminal mischief, the defense of justification bars any charges. Criminal mischief can

be proven where the actor negligently damages tangible property of another in the employment of fire. However, we have concluded that Richmond only intended to permit the fire to destroy the bunker, which the City could have dismantled lawfully had it pursued its civil remedies, and which police could have destroyed legitimately pursuant to the statutorily authorized use of force to effect arrests. Therefore, criminal mischief charges cannot be lodged against Richmond.

For these reasons, we have concluded that no charges may be brought for the decision to let the fire burn.

IX. EVENING OCCURRENCES IN THE BACK ALLEY

Very substantial investigative resources were expended by us in an attempt to determine precisely what occurred behind the MOVE compound in the early evening of May 13, 1985. Specifically, we wanted to determine (1) the veracity of the May 16, 1985 Daily News article which categorically stated that a gun battle took place in the area which has become commonly known as the "back alley," and (2) the validity of the MOVE Commission's finding (made over Commissioner Bruce Kauffman's dissent) that police gunfire prevented the escape, into the alley, of at least some of the occupants of the burning MOVE residence. We also considered the suggestion previously offered by some individuals that, after allegedly shooting and/or killing some MOVE members, police threw the bodies of those members back into the house, thereby accounting for the fact that all of the bodies recovered after the fire were found within the perimeter of the house (see Part XI).

As previously noted, because of the special powers of the Grand Jury and the cooperation secured from many previously uncooperative witnesses (including Police Officers William Klein, Frank Powell, Charles Mellor, Michael Tursi, James Berghaier and John Reiber), we had access to substantial testimony and evidence about the evening occurrences in the back alley which previously was unavailable to either the media or the MOVE Commission. We also largely were able to avoid relying on some of the hearsay evidence upon which the MOVE Commission had to rely. These factors, among

others, now allow us to state unequivocably (1) that the back alley gun battle reported by the media did not occur, (2) that police gunfire did not prevent occupants of the MOVE house from escaping or cause injury or death to them, and (3) that no criminal charges should be brought in connection with what transpired in the back alley on the evening of May 13, 1985.

The evidence supporting these conclusions was provided by no fewer than forty-eight different witnesses. Many others were interviewed but not called because it was determined that they had nothing to add or were merely cumulative. With the exception of Ramona Johnson Africa, whose non-appearance has already been discussed by us, we were not deprived of the testimony of any witness who had information germane to the back alley events under investigation. Virtually all of the forty-eight people who testified under oath with respect to this matter were either in or near the back alley during the pertinent time period. Thirty-two of these individuals were attached to the Police Department at the time of the occurrence; thirteen were firemen; and two were associated with the media. The other witness who gave testimony with respect to these events was Michael Moses Ward, previously known as Birdie Africa.

The testimony from these witnesses was diverse and, in many regards, conflicting. The pertinent issues which we had to consider and resolve based on this sometimes conflicting testimony were as follows: (1) whether and to what extent gunfire occurred in the back alley; (2) whether it can be definitively established

that shots, if any, were fired by either a MOVE member or a police officer; (3) how many MOVE members and children actually left their burning residence; (4) what happened to those individuals; and (5) whether any credence should be given to one detective's assertion that he heard a fellow police officer say that he had "dropped" a MOVE member in a specific back alley location. Our summaries and conclusions with respect to the testimony of various witnesses bearing upon those matters follow. In reaching these conclusions, and determining what testimony to credit, we have been particularly cognizant of the demands which the events of May 13th and the early evening placed on the senses and mental capacities of the witnesses. In particular, the conflagration obscured vision with smoke and confused hearing with the noise of crackling electrical wires, exploding aerosol cans, a roaring inferno and operating fire equipment. This, coupled with the stress, fear and fatigue arising from the day and the circumstances, undoubtedly affected the perceptions of those who sought to shed light on the events under investigation.

The witnesses who gave evidence about the back alley events fell in two categories: those who had some view of the alley and/or the movement of people therein, and those who did not. The latter group, made up of more than thirty people, was the larger group and their testimony varied substantially. For ease of reference, the evidence which they offered is reviewed by us based primarily on their locations at the pertinent times.

Discrepancies in testimony cannot be resolved based on mere location, however. Individuals within a few feet of each other often perceived events and sounds entirely differently; witnesses further removed from the back alley sometimes heard things not heard by those closer.

The testimony given by witnesses near 62nd Street and Osage Avenue, at or about the time when Sergeant Donald Griffiths announced on police radio that MOVE was coming out, was, for example, quite varied. Pete Kane, the WCAU cameraman secreted in that area, told us that he was aware of much movement by Stake Out officers, but that he did not recall any gunshots and certainly would have reported gunshots had he heard them. Four other nearby witnesses testified consistently with Kane, although with some qualifications. Lieutenant Dominic Marandola stated that he was not aware of any shots being fired, and said that the sounds of the fire could either have masked the sounds of gunshots or have been mistaken for gunshots. He noted that embers and surplus ammunition were popping "all over the place," and said that he personally knew of one thousand rounds of live ammunition which had been abandoned to the fire. Sergeant Edward Connor and Corporal George Minner stated that they heard noises before Griffiths' radio announcement but could not say with any certainty that what they heard were gunshots. Connor said that, while he did not hear shots, he believed that some shots had been fired based on the fact that people took cover. Detective Nathan Benner testified to hearing no shots. Had there been rapid gunfire, he was

confident that it would have been noticed by him. He was not certain, however, that he would have heard single shots. Officer James Muldowney, in contrast, was certain that he heard perhaps half a dozen shots, which he described as rapid, semi-automatic, small caliber fire. Officer Daniel Angelucci said that he heard three or four gunshots at the point when Post Four said that they were taking shots and that people were coming out, but that he heard no shots subsequently. Captain Edward McLaughlin heard five or six popping sounds. A fireman suggested to him that those sounds were caused by aerosol cans or electric wires; McLaughlin told us, however, that, in his view, they were consistent with semi-automatic gunfire, but definitely not automatic fire. Fire Fighter Farrell testified to his observations from in and near 6226 Osage Avenue. First, while in the property's rear yard he heard what he believed were shots, although a policeman told him that these sounds were probably exploding unfired ammunition. Upon entering the premises and proceeding to the second floor front bedroom, he heard popping sounds. Although he still believed that this was exploding ammunition, he was told to get down. Thereafter, he heard gunfire, which he described as single shots, and then thought that he heard someone returning fire.

Testimony from witnesses further down 62nd Street, closer to Addison Street, was equally inconclusive. Officer James Haworth categorically denied hearing any gunshots. Officer Michael Ryan, however, stated that he heard three to five rounds fired which sounded to him like .22 caliber, semi-automatic fire, although

they could also have been single shots. He also told us that he did not see or hear any police weapon(s) being fired.

Numerous police officers and firemen were also concentrated in the area between Pine Street and Osage Avenue, in the half block immediately to the west of 62nd Street, during the pertinent time period. Their testimony was similarly divergent. Lieutenant Fred Endricat of the Fire Department testified to hearing one shot, followed by three or more shots. Fire Fighter John Sawyer heard two or three gunfire bursts close in time, the last being a rapid burst. Fire Fighter Bernard Boyd heard six single shots less than a minute after someone ordered people out with their hands up and stated that "they would not shoot." Officer Marone said he heard four or five shots at the pertinent time; Officers Thaddeus Cymerman and Marshall Freer, however, stated that they heard no such shots. Freer further stated that he heard no shots at all throughout the evening and was unaware of any police officer discharging his weapon. Cymerman qualified his testimony by saying that it was possible that he might not have heard the discharge of a .22 caliber firearm which makes less noise. He also said that no police weapon was fired from the area where he was located and that no one with whom he spoke acknowledged discharging a weapon. Officer Stephen Rementer told us that he heard what he believed at the time were ten to forty single, very slow, small arms gunfire shots. He also stated that snapping electric wires would have made almost exactly the same sound and that, what he had then thought was gunfire, might well not have been.

Witnesses in the Pine Street area gave similarly diverse evidence. Fire Fighter Bernard Dyer testified to hearing random gunshots -- more than one, but "not a lot more" -- while Fire Fighter Daniel Littley, who was close by, said he heard no shots, although there were sounds which he imagined that some could construe as gunshots. Sergeant Revel testified to hearing four or five .22 caliber shots coming from the back alley. Officer William Stewart, who followed Sambor to an alley on Pine Street, stated that he heard three or four muffled shots. (Stewart also gave credible testimony that he had never previously told a MOVE Commission investigator that he had fired a machine gun to clear this alley for Sambor.)

Sambor, who was also in the Pine Street alley, testified that he heard no gunshots at the time. Given this aspect of Sambor's testimony, as well as Captain Eugene Dooley's further testimony that he (Dooley) was relatively sure that he told Sambor that evening (based on the statements that he then took) that no police weapons had been discharged in the rear alley, we asked Sambor why he reported a back alley gun battle at a subsequent press conference. Sambor attempted to justify his action as follows:

> ... because one of the rumors, if you will, reports or whatever had come to my attention was that the police were shot at, and they had responded. And that is why I said that I made that comment at the press conference. But then when it was brought to my attention that there was no shooting, to avoid any further misapprehensions or misunderstandings of what did occur back there, I made a call

> to either Inspector Tiers or Captain Kirchner, one of the commanders at the scene, to find out if there, in fact, had been shooting in that alley. And they came back into the press conference and told me no, there was absolutely no shooting in that back alley. And I then at that time relayed that to the press conference.

We cannot discern from this the reason for his thoughtless and ill-based statement to the media. It is unfortunate that the then Police Commissioner chose to so carelessly and cavalierly suggest to the media that a gun battle occurred when he had never verified this.

Most of the remaining witnesses within "earshot" of the back alley were in the vicinity of Cobbs Creek Parkway (63rd Street), between Delancey Street and Addison Street. Their testimony also varied greatly. The television technician in the area of Cobbs Creek Parkway and Delancey Street testified that he did not hear any sounds which he could identify as gunfire; Fire Fighter Joseph Jackson, however, who was close by at Pine Street and Cobbs Creek Parkway, testified to hearing a lot of rapid fire -- "rolling fire" -- lasting ten to twelve minutes. Fire Fighter Ralph Epperson, who was at Cobbs Creek and Osage Avenue, testified to first hearing intermittent sounds and then automatic rapid sounds which sounded like they were coming from the MOVE house. Officer Louis Saxon said that he heard fewer than twenty shots, which appeared to come from weapons of two different calibers; Officer Forbes testified to hearing five to eight shots and stated that it was his impression that there was a gunfight in the rear of the MOVE house. Officer Matynka, however, said that, while he heard popping

sounds, he was not sure whether they were gunshots. Finally, Fire Fighter Thomas Shaw, who was on Cobbs Creek Parkway between Osage Avenue and Addison Street, said that he heard a single-spaced series of shots which was followed, after a pause, by a rapid fire response.

As the foregoing summary makes clear, there was absolutely no consensus with respect to the number (if any) of gunshots which were heard at the pertinent time by those individuals within earshot of the rear alley. The discrepancies among and between the testimony of those individuals, however, was partially resolved by the evidence offered by individuals who were closer to the back alley and, thus, better able to determine what happened.

Michael Moses Ward, previously known as Birdie Africa, was obviously one of the most significant and important witnesses in our inquiry into what occurred in the back alley. Throughout the events of May 13, 1985, Michael -- together with the other children and women residing in 6221 Osage Avenue -- remained in the house's dark attached garage. This lower rear portion of the compound had been modified so that it was accessible to the outdoors only through a small "door" or hatch which led to the back alley and could be opened only by an adult using a wrench or similar tool. It was not a true door, but, rather, a small opening which allowed a person to exit the compound by crawling.

According to Michael, at a point in the early evening, while the fire was in progress and all of the house's residents had gathered in the garage, Conrad Africa ("Rad") opened the small

rear door which gave access, by crawling, to the back alley. Michael said that he assumed Conrad used a wrench because that was what was normally used, but that he did not actually see the wrench. He also told us that he did not know whether Conrad then exited the house or merely placed his body in an exposed position by the opening.

Michael's perception of the events following was that, when the door was opened, he heard what he believed was rapid gunfire which he thought was coming from the police. At that point, Conrad closed the door but did not re-bolt it. Neither Conrad, nor anyone else, however, then said anything about gunfire.

Shortly after the door was closed, the adults started yelling: "We're coming out.... The kids are coming out." The door was then re-opened and, as Michael described it, "... we all started crawling over each other to get out." He described the interior of the garage as "hot and smokey." He told us the smoke was hurting his eyes and he felt "dizzy."

Once outside, Michael said he saw Ramona, "Tree," and Phil. He described Phil as about his size, and "Tree" as being taller. He testified that he last saw "Tree" up on the walkway which abutted the rear of the driveway behind the MOVE compound. Michael's final recollection of Phil was Ramona attempting to help him up onto that raised walkway in the driveway area. He also described for us how he walked down the driveway and was found by the police.

Significantly, Michael told us that no one had attempted to leave the compound before he heard what he thought was gunfire. He also stated that he heard nothing which he believed was gunfire either during or after the time when he and the others left the burning building by crawling through the door into the back alley.

The testimony given by the police and firemen who were in a position to see what happened in the back alley confirmed some aspects of Michael Ward's testimony but not others. Most importantly, these people corroborated Michael's assertions that no MOVE members were shot at after leaving their burning house and that individuals other than Michael and Ramona at least initially escaped into the alley. In no respect, however, did they corroborate Michael's assumption that there was police gunfire when the crawlway door was first opened by Conrad. Neither was there any agreement among any of these witnesses, including Michael, as to how many MOVE residents actually appeared in the alley.

The nearby back alley witnesses were primarily concentrated in three areas: (1) properties at the alley's east end abutting Pine and 62nd Streets; (2) the house at 6218 Pine Street, also known as post Four; and (3) alley property to the west of the MOVE compound in the general area of 6246 Pine Street.

With respect to the first group of witnesses, Fire Fighter Stabinski was positioned so that he could see up the alley all the way to the MOVE house. At one point he heard several shots and fled. He had no idea where the shots came from and saw no one in the alley before leaving. He was absolutely certain,

however, that the shots were not fired by police officers in the area where he was located. Fire Fighter Murray also testified to hearing shots while in this general area. He heard a burst of four to five small automatic or erratic semi-automatic shots from the rear alley. This occurred at about 7:20 p.m. before he entered 412 South 62nd Street. After hearing the apparent gunshot burst, he entered 412 South 62nd Street and proceeded to the property's rear. While there, he heard a woman yelling "We're coming out. Don't shoot at us." At about this time he saw Stake Out officers in the alley and heard them say words to the effect "Come on out. We're not going to shoot at you." A few minutes later, he saw a woman and a child in the alley; he lost sight of them, however, when they made a dash to the wall. Later he saw the woman, without the child, three houses down the alley moving towards Cobbs Creek Parkway. Murray was absolutely sure that he heard no shots either when he saw the woman and/or child, or while the officers were shouting. Further, he was adamant that he would have heard shots had they occurred. He also told us that Stake Out officers later told him that they had seen three MOVE members in the yards, possibly with weapons.

In contrast, Fire Fighter Hamilton, who was inside 408 South 62nd Street from 7:10 p.m. on, was adamant that he heard no gunshots at the time when Murray said that they occurred. From his vantage point at the rear of 408, Hamilton saw four or five police officers and one confused child in the alley. He was uncertain of the child's sex, estimated the child's age as between eight

and fourteen years, and said he did not know if the child was Michael. He further testified that he did not hear any yelling.

Police officers in Post Four, overlooking the alley, also provided valuable evidence. They included Officers Marcus Barianna and William Trudel, and Sergeant Donald Griffiths, all of whom were located in the second floor rear bedroom of 6218 Pine Street. Barianna was positioned in the room's rear window which afforded him a view of the alley and the MOVE house. He heard a female voice yell three to four times "We're coming out ... don't shoot." He then saw a boy about twelve years old in the rear driveway adjoining the MOVE property. His next observations were of (1) a younger boy about seven years old; (2) a woman, whom he later identified as Ramona; and (3) an adult male. He saw Ramona running towards the middle of the yard, while the first boy, who appeared confused and scared, fell back off the wall and ran around the yard. The younger child was then within four feet of Ramona and was grabbed by her. At this same time Barianna saw the male standing, pointing a rifle in his direction. The officer reacted by ducking inside, at which point he heard a "crack" followed by three or four more cracks. He did not return the male's apparent gunfire, nor did any other officer in the room. When Barianna returned to the window he saw no one.

Trudel's description of what occurred was similar, but not identical. He was positioned in a window to the right of Barianna. He also heard the female's voice stating words to the effect that people were going to exit the MOVE compound with children. To

that point he had not heard any gunshots. Thirty seconds to a minute afterwards, he heard banging sounds, like an ax or a hammer, which caused him to conclude that someone was trying to open the 6221 garage door from inside. He then saw a young male, about ten to fourteen years old, who came out, climbed the back wall, and fell back. An adult female then came out and motioned to a young child about three to five years old. Next, Trudel saw a ten to twelve year old boy, followed by an adult male with a rifle. The adult male pointed the rifle at Barianna's position and fired four to five times. Trudel also told us that neither he nor anyone else returned fire. This was because the gunman had shielded himself with the young child. The gunman then disappeared in the smoke, as did the child with him, while the smaller child broke away from the female and appeared to run back into the MOVE compound. At that point, the adult female went towards the walkway and out of his view.

Trudel believed that the adult female he saw was Ramona and the child who fell back was Michael. He also told us that, after losing sight of the woman, he heard nothing which sounded like gunshots or which suggested that any MOVE members were driven back by gunfire. He said that he did not see the adult male with an infant in his arms. Neither did he see the male firing his rifle in a westerly direction down the alley as did Officer Tursi at the west end of the alley.

Griffiths, who was in the rear bedroom with Barianna and Trudel, did not have a view of the alley because those officers

were positioned by the room's windows. When the fire was so intense that he was about to order an evacuation, he heard a female voice shout "We're coming out ... don't shoot." Being in possession of a police radio, he started to broadcast what was occurring; while he was on the radio Barianna and Trudel reported to him that they were being fired upon and he heard four or five shots; these were followed by a slight hesitation and three or four additional shots. Griffiths said that Barianna and Trudel thereafter told him that they had "lost him." He also informed us that there was no return gunfire by the police, and said that attempts were made to give the people in the alley safe passage from the fire by opening the back door of 6218 Pine Street and yelling for the persons to come into the house to escape the fire.

Officer Thomas Fitzpatrick was on the first floor of Post Four when Griffiths began broadcasting on police radio from upstairs. Fitzpatrick categorically stated that, although he heard cracking sounds before the broadcast, he could not say that they were gunshots. He testified that, after the broadcast, he ran upstairs briefly, at which time he saw Griffiths, Barianna and -- he believed -- Trudel. He also said that no gunfire emanated from anywhere in Post Four at or about this time.

Officers Mellor, Tursi, Berghaier, D'Ulisse, Reiber and Mulvihill, who were in the western area of the alley, also testified to what occurred. Mellor recalled hearing four to six small caliber gunshots at almost the same time that Griffiths began

broadcasting on the radio. He could not see where the shots were coming from because of the debris behind the MOVE house which obscured his vision. He did see Ramona scaling the fence, and then observed an adult male with dreadlocks who looked towards their position and then disappeared behind the debris. Mellor next saw a disoriented young boy, whom he later identified as Michael Ward, attempting to make his way down the alley. Michael fell several times and was ultimately picked up out of a pool of water by Berghaier who dashed into the alley and carried him to safety. Mellor was positive that he heard only the four or five shots simultaneous with Griffiths' broadcast, and that there was no return fire from police.

Tursi testified that, from his point of observation at the west end of the alley, he witnessed MOVE members exiting 6221. He first saw Ramona scaling the fence, and then saw a light-skinned male with a rifle and a child scaling the debris behind the compound. Tursi saw the male fire several shots at the rear of the Pine Street homes, and then turn and fire several shots towards the western end of the alley. The male, who was firing with one hand and did not appear to be really aiming, then disappeared into the debris with the child. Tursi believed that the male was firing a .22 caliber bolt action rifle and said that he did not hear any other gunfire. He also frankly acknowledged that he could not explain how a bolt action rifle could be fired with such rapidity with one hand.

Tursi next saw Michael attempting to make his way down the alley and witnessed his rescue by Officer Berghaier. Both Mellor and Tursi told us that an electric transformer located on a utility pole above their position was crackling rapidly when Ramona and Michael were found by police. According to Mellor, the sound of the electrical transformer was so ominous that the officers evacuated their position to get away from nearby pools of water.

Berghaier also testified to hearing small caliber gunshots (probably .22 caliber fire), but stated that he heard only three single spaced shots. He first saw Ramona coming over the fence of the MOVE yard and then saw Michael emerge from the fire as he walked down the alley. From this point his attention was directed almost exclusively to Michael. Berghaier repeatedly waved and hollered for the child to keep coming towards him and saw him fall while Ramona was attempting to pull him up the walkway. Michael got up, but fell into a pool of water. Berghaier then ran into the driveway and took Michael to safety.

D'Ulisse, Mulvihill and Reiber offered less detailed testimony about people's movements in the alley. Besides seeing Ramona and Michael, D'Ulisse saw three figures, five or six houses down, but could not see if these people had any firearms. He said he heard no gunshots and did not see anyone -- MOVE member or police officer -- fire a weapon.

Besides seeing Ramona and Michael, Reiber saw a third person. He was unable to say whether that person had a weapon; the record suggests that this individual was an Osage Avenue neighbor, not a

MOVE member. Reiber also told us that, while it was noisy in the back alley, he did not hear anything which he distinguished as gunshots. He also stated that he did not see any children besides Michael.

Mulvihill apparently did not see any MOVE members besides Ramona and Michael. He also said that he did not see anyone fire a weapon and that he did not hear any gunshots. Had a .22 been fired, however, he said that it was possible he might not have heard it.

We have herewith set forth in extensive detail the testimony of the vast majority of the witnesses who gave evidence pertaining to the back alley. Our purpose was to make clear not only the diversity of the recollections of the individuals who saw and heard the events in question, but also the traumatic circumstances in which those recollections were formed. We want to make it very clear that we do not question the integrity of any of the witnesses to these events whose testimony we have referenced or any of the other witnesses who provided evidence about these matters. Indeed, it is significant, and we wish to note, that many police officers who had previously refused to testify spoke to the investigating attorneys and testified before us without even requesting immunity. We also believe that Michael Moses Ward testified honestly as to his impressions of what occurred.

The fact that we have concluded that the witnesses testified to the truth as they believed it to be, however, is not dispositive

with respect to the accuracy of their recollections. Since their evidence was quite frequently conflicting, of necessity some of their testimony had to be discounted or rejected by us. For example, of those witnesses who testified that they heard gunfire, some said that it was automatic fire, while others described it as semi-automatic fire, and still others limited the shooting to a few single shots. The accounts of those who heard automatic fire ranged from six shots in succession to ten or twelve minutes of rolling gunfire. Others, of course, said there was no gunfire at all, while many witnesses said that there were lots of noises which could have been confused with gunfire.

Having heard and considered all of this testimony, we reject any contention or conclusion that a pitched gun battle, of any sort, between the police and MOVE members occurred in the back alley. Such a finding is absolutely inconsistent with the vast weight of the extensive evidence presented to us. Moreover, against all of this testimony regarding sounds consistent with gunfire, not one witness testified that he saw any police officer fire a weapon in the alley on the evening of May 13, 1985. Nor did any officer admit such action even though some officers testified with immunity and, thus, could freely have admitted to firing at MOVE. It is our conclusion that the extent of the gunfire in the back alley was limited to between four to ten rifle shots fired by an unidentified male MOVE member.

The only direct evidence offered by witnesses present on May 13, 1985, which even remotely suggests that police earlier fired

on persons in the MOVE compound when they attempted to leave, was Michael Ward's impression that he heard gunfire when "Rad" first opened the crawl space. When put in the context of the sounds barraging Michael and the others on the scene, however, the accuracy of his perception simply is not at all clear and we decline to find that what he heard was gunfire. Michael was exposed simultaneously to the roar of the fire and to the crackling of electrical wires and transformers. These facts, coupled with the ordeal which Michael underwent for nearly fourteen hours prior to leaving the compound, explain his erroneous impression. Indeed, that misperception is in many respects confirmed by Michael's own testimony (1) that no one discussed the police firing on the compound when the crawl space was first opened, and (2) that neither Michael nor any other MOVE member was fired on by police when they subsequently exited the compound.

The only additional evidence even remotely implicating any police officer in questionable conduct in the back alley was offered to us by Detective William Stephenson. According to Stephenson, Griffiths stated after the incident that the digging should be concentrated at a particular place at the rear of the MOVE property because Griffiths "dropped a male who fired upon him as a woman and child came out, or words to that effect." Stephenson told us that he overheard this remark at the scene, while he was thirty-five to fifty feet away from Sergeant Griffiths and while a crane was operating.

We do not question Stephenson's integrity; we are, however, compelled to reject his testimony. In part, we do so because Stephenson himself told us that he may have "misunderstood" or missed a word that would put Griffiths' statement out of context. He also admitted to us that he had previously told a MOVE Commission investigator only that "it's possible he (Griffiths) said dropped him or he was dropped." More importantly, however, Stephenson's testimony on this point is at variance with considerable other evidence. Stephenson said, for example, that eight or so other persons were nearby when Griffiths' remark was made, but no one else verifies Stephenson's recollection of the event. In this regard it is particularly noteworthy that Battalion Chief Skarbek, who testified before the MOVE Commission about his impression of a similar statement by a police sergeant to the crane operator in the back alley after the incident, was certain that Griffiths was not the person who made that statement. When Skarbek then testified he also substantially qualified his degree of certainty about what he thought he heard.

We have concluded that the testimony of Griffiths and others with respect to the post-incident back alley conversation is the more credible explanation of what occurred.

Griffiths testified that, on May 16, 1985, while at the scene, someone asked him to point to where the MOVE member with the rifle had been in the alley. He replied that he could not, but that he could get someone who would. He then summoned Trudel, who showed them the area and said "he dropped out of sight about

here." At that point Griffiths turned to the authorities and repeated Trudel's remark. Trudel confirms Griffiths in his testimony. He said that, during his May 16, 1985 conversation with Griffiths and others, he (Trudel) pointed to an area in the alley and said, "That is where I last saw the [male]; that is where he dropped out of sight," and that Griffiths then repeated this statement to the police. Moreover, no human body was recovered from the area in question, but only an animal carcass. Finally, and equally significantly, there is overwhelming evidence that no one in Post Four, including Griffiths, fired a weapon during the evening of May 13, 1985. Indeed, it would have been physically impossible for Griffiths to have done so because he was on the floor of Post Four talking on the radio when the shooting occurred, not at the window, and never even saw anyone in the alley.

We are aware that our determination of the events in the back alley conflicts with the conclusion reached by the MOVE Commission. The Commission, for example, found that a man and a boy tried to exit but returned to the house as a result of police gunfire (Finding No. 28, p.353). Absolutely no evidence presented to this grand jury supports such a finding, however. Michael testified that "Rad" opened the garage door, heard the gunfire, and then closed the door. The adults then started to yell that they were coming out, opened the door again, and began coming out. Michael specifically testified that he did <u>not</u> hear any gunfire after they opened the door for the second time and began to come out. This is consistent with the testimony of the many

witnesses who had some view of the back alley, none of whom -- including Michael -- saw any officer fire his weapon.

Moreover, we heard credible evidence that several officers at the scene demonstrated a great desire to save the lives of MOVE members and children: When the male MOVE member fired at police, Tursi did not return fire for fear of hitting a child. Berghaier watched Michael attempt unsuccessfully to scale the fence, fall (hitting his head on the concrete), then wander in a daze away from the officers, and finally fall face-down in a pool of water. Despite the risk that he might be shot by MOVE members, burned in the fire or electrocuted by live wires falling into the water, Berghaier went deeper into the alley to rescue Michael. (Berghaier subsequently left the Police Department because of emotional stress from the events of May 13, 1985.) Marandola, Griffiths, and Griffiths' men remained in Post Four even as it became engulfed in flames, yelling for MOVE members to come into the post and escape through the front door onto Pine Street with them. (The metal-framed eyeglasses of Griffiths' subordinate officer actually buckled in the intense heat as they waited.)

Our disagreement with the Commission's finding is based on the evidence presented to us. However, because the issue is critically important, we have also reviewed the evidence upon which the Commission based its conclusion. It is our opinion that the evidence cited by the Commission -- the presence of a few metal fragments in three decedents and its interpretation of Michael Ward's testimony -- does not support its own conclusion.

The Commission reproduced in its Report a portion of its interview with Michael, which it believed "so clearly supports [the Commission's finding] that it is difficult to imagine how any individual who saw this child testify or who has had the opportunity to read the transcript of his testimony could possibly reach any other conclusion" (Foreword to the Report of the Special Investigation Commission, p.278). We note initially that Commissioner Kauffman, whom we assume saw Michael testify and read his transcript, did reach another conclusion. We further note that nowhere in the transcript does Michael explicitly say that MOVE members actually exited and then returned. Instead, Michael indicated in his testimony before the Commission that Conrad "was taking Tomaso out" and that he "tried" to take Tomaso out. When asked whether Conrad had anything in his hands when he went outside, Michael answered "He didn't go outside," and when asked "Did he get all of you all the way out of the garage door with Tomaso?" (am ambiguous question), Michael replied negatively. Although Michael's testimony is unclear, apparently no MOVE person actually got out of the garage before the police gunfire allegedly heard by Michael was supposed to have occurred.

Moreover, the Commission's finding relied heavily on Michael's putative ability to identify gunfire. As Commissioner Kauffman noted, however, Michael testified that he had never heard gunfire in his life. Commissioner Brown completely discounted that by noting Michael had heard 10,000 rounds fired that day. However, veteran Stake Out officers on the scene -- who have heard many

more than 10,000 rounds fired in their careers -- testified that they could not determine whether the noises they heard that evening were gunfire, live wires crackling, abandoned live ammunition detonating, aerosol cans or gas pipes exploding, or any other number of possible concussions. We thus find Michael's identification of gunfire dubious.

Furthermore, even had Michael normally been able to distinguish among noises, his perceptive abilities that night may have been quite limited. As previously noted, Michael spent the entire day in the garage (at times wrapped in wet blankets), surrounded by many people and dogs, with no light, during a violent confrontation between his "family" and police. He was given nothing to eat or drink the entire day. By the evening of May 13, 1985, he said, he felt dizzy as he sat in the smoke-filled garage. Such a state of physical, emotional and mental exhaustion is not conducive to keen or even accurate perception. Indeed, Michael apparently was unable to distinguish MOVE members by their voices that night, let alone distinguish gunfire from other noises: He testified that "Ball" (John Africa) was in the garage during the fire and gave the order to let the children out, yet all of the evidence suggests that John Africa died long before the fire and was in fact the body seen by Angelucci in the crawl space during the morning confrontation. This inaccuracy in Michael's testimony, together with his fatigued state and the inability of experienced officers to distinguish gunfire from the other noises heard that evening, casts considerable doubt on the Commission's conclusion.

(Moreover, even if Michael's testimony is deemed reliable, then his testimony before both this grand jury and the MOVE Commission that he heard no gunfire after MOVE yelled that they were coming out establishes that police gunfire did not drive MOVE members back inside.)

Finally, in support of the Commission's finding, Commissioner Brown noted (as discussed in Part XI below) that metal "fragments" consistent with double-ought buckshot were found in one child's body. Dr. Robert Segal of the Medical Examiner's Office testified, however, that although a single fragment found in one child's arm was consistent with buckshot, the absence of any other pellets in her body made it inconceivable that she had been shot. Moreover, no one has ever testified to hearing shotgun blasts in the back alley. Thus, the evidence does not support the Commission's finding.

Another version of the events in the back alley, which has been publicly asserted by some individuals, is that police killed the MOVE members and children as they fled the burning compound in front of dozens of witnesses and then jammed their bodies back into the house. To accept this explanation, however, one must not only believe that police murdered the children in cold blood, but also that they then risked being shot by MOVE members as they went into the intense heat of the burning block and shoved wounded/dead adults and children one by one through the house's tiny door. The theoretical improbability of this explanation, the lack of any evidence to even remotely support it, and contrary

physical and medical evidence, including, inter alia, the placement of the bodies at particular levels and under debris (discusse more fully in Part XI below), compel us to give it no further consideration.

The most reasonable explanation of what happened in the back alley is that the one adult besides Ramona Africa and the one or two other children besides Michael Ward who came out chose to return to the compound out of fear, confusion, a mistaken belief that the police were firing at them or that the garage was safe, or simply based on irrational decision-making. The area into which those who escaped the garage emerged was hellish: Many of the houses along the back alley were engulfed in flames, and at least some portions of the fence surrounding the compound were on fire. To get out of the yard, MOVE people had to climb up a pile of debris, grab onto a fence along the walkway and hoist themselves over it -- a task which not all of those who tried were able to do. Burning tree branches were falling in the yard; one of the children apparently was burned by a falling limb. Unfired ammunition was exploding, wires were crackling, and numerous othe concussions were causing loud, explosive sounds not unlike gunfir Into this terrifying scene came children who were frightened, hungry, tired and confused. One ran in circles, one stood still crying or screaming. Michael did not always follow Ramona and at one point even wandered in the opposite direction. It is not implausible to suggest that these children -- physically weak,

emotionally distraught and mentally confused -- may have gone back into the compound to be with the adults.

The one adult seen in the yard may have been similarly confused or, hearing the numerous popping noises, may have thought he was being fired on by police and so returned to the compound. Additionally, the adult may have returned to the compound to "cycle" himself, as the MOVE doctrine termed dying, for his cause. Finally, it is possible that some irrational motive prompted his return. (It is worth bearing in mind that MOVE chose an armed confrontation with the Philadelphia Police Department rather than surrendering when they had but five weapons, and then chose to remain in a burning building, keeping their children inside, for nearly two hours before anyone even suggested leaving. Such decision-making is not, by most standards, rational.)

In summary, we have concluded that, although the evidence does not conclusively establish the reason why MOVE members and children -- if they did indeed leave the garage -- nonetheless returned, the evidence does not support the MOVE Commission's finding that police drove MOVE people back inside. The evidence also refutes the irresponsible allegation that police killed MOVE members and stuffed their bodies in the house. With respect to these points, there is no doubt whatsoever.

We have conducted a lengthy and thorough investigation, fully cognizant of the MOVE Commission's view that there was police impropriety committed in the back alley during the evening of May 13, 1985, as well as the desire of some to find that police

criminality occurred. Our endeavors, however, have disclosed no credible evidence even suggesting, much less tending to prove, that the police in the back alley either engaged in a gun battle or discharged their weapons during the evening of May 13, 1985. There was no discernible police misconduct in the back alley and we so find.

X. THE FIRE DEPARTMENT'S HANDLING OF THE FIRE

Although no fire was anticipated, there was still a substantial Fire Department presence at the May 13, 1985 scene. Initially, three rescue squads, a ladder company, two Hundred-Series pumpers, two fire squirt gun vehicles, and various assorted command vehicles were present. The ladder company's purpose was to provide police with access to the roofs; the squirt guns were intended to direct water on top of the MOVE house to keep MOVE members from crossing the roof. Between approximately 5:00 a.m. and 11:15 a.m., the squirts were used in their intended capacity; thereafter, they remained off until shortly before the satchel charge was dropped. At that juncture, they were briefly turned on to deter MOVE members from venturing onto the roof and firing at the helicopter.

After the charge's detonation, at approximately 5:45 or 5:50 p.m., it became apparent that a roof fire had developed. That the fire was not then actively fought was initially the product of a Police Department order that the squirts should not be used, and the Fire Department's fear that fire fighting would impede Police Department operations on the rooftop. An additional pumper was, however, called in. It was dispatched at 5:53 p.m. and arrived on the scene at 5:57 p.m.

Within ten minutes of the pumper's arrival, a deluge gun, which reached as far as 6217 Osage Avenue, was set up and turned on. Under Police Department orders, however, that gun was moved because it could be reached by MOVE bullets. After being relocated,

it was thereafter turned on again a second time. However, it was on only briefly and then turned off because it limited the ability of the police to see the MOVE house. This sequence may have been repeated once or twice more.

As has already been discussed, no other efforts were made to fight the fire until 6:32 p.m. Beginning then, and for the next forty-five minutes, the squirts were sporadically employed, in an attempt to control the fire. In addition, six full alarms were eventually sounded. Each full alarm consisted of four engine companies and two ladder companies, with two battalion chiefs. The first alarm was called in at 6:54 p.m.

The arriving fire fighters could not freely fight the fire because of the possibility that MOVE could still shoot at them. Accordingly, normal fire fighting procedures could not be employed and unorthodox fire fighting techniques were adopted, with lessened effectiveness and minimal success. Such techniques, of necessity, continued to be employed until approximately 9:30 p.m. when the decision was made that the lives of the fire fighters would no longer be endangered.

By way of illustration, fire fighters arriving at approximately 7:00 p.m. tried to fight the fire from the homes on the south side of Osage Avenue. They proceeded into this area via the alley between Osage Avenue and Addison Street. Their intention was to get as close to the MOVE house as possible, put hose lines on the first and second floors of the facing houses, and play water across the street into houses on the west side of the

street as close to 6221 as possible. (By that time 6221 was lost to the fire because the threat of gunfire had earlier precluded a direct fire-fighting assault.) Doing this, while also playing water on the homes to the east of 6221, was intended (1) to stop the fire from travelling east and west, (2) to establish a fire curtain, and (3) to prevent a radiant-heat fire from spreading to the south side of Osage Avenue. Sounds, which some people interpreted as gunfire, however, necessitated the withdrawal of the fire fighters and their return to the Cobbs Creek Parkway area.

Attempts to fight the fire from the rear during this same time period were likewise abortive. After police checks of some of the Pine Street properties, fire fighters were permitted to enter those buildings to ascertain from the rear the extent of the fire. Before anything could be accomplished, however, a rumor that armed MOVE members had escaped prompted the removal of some firemen, while gunfire-like sounds caused others to leave. Similarly, an acting battalion chief who attempted to bring hose lines down the back alley toward 6221, to fight the fire from that vantage point, was prevented from doing so by Stake Out officers for safety reasons.

The foregoing are examples of the restraints which were placed, for a substantial period of time, on the Fire Department's ability to conventionally fight the fire resulting from the explosion of the satchel charge. It was not until 9:30 p.m. -- four minutes before the sixth and last alarm was sounded -- that the firemen were permitted to normally and conventionally proceed. By that

time, fifty homes were fully involved. Two hours and ten minutes later the fire was declared under control with the loss of only eleven additional residences. That the additional loss was so limited was labelled by fire expert Charles King as the product of a "super human effort."

XI. EVIDENCE RETRIEVAL AND ANALYSIS

In the aftermath of the police confrontation and the resulting inferno, personnel from the Police Department, the Fire Department and the Medical Examiner's Office processed the scene, searching for bodies and for evidence. Later, an internationally renowned team of pathologists and a nationally known fire expert also examined the bodies and the evidence in an attempt to determine what happened on May 13, 1985.

While processing a crime or fire scene is always an important task, it was, in this case, a critical one. The unanswered questions here were myriad. On May 14, 1985, it was not known whether any MOVE members had been killed in the morning gun battle, whether they all had died in the fire, or whether any members other than Ramona and "Birdie" (Michael Ward) had escaped. Indeed, it was not even known how many people had been in the compound before the fire. Because police thought that MOVE may have had tunnels leading away from the compound, there was some question whether MOVE members may have escaped altogether. Additionally, rumors that police had shot at MOVE members in the alley during the fire raised questions about whether the police had killed MOVE members or otherwise acted criminally.

In addition to the questions concerning the deaths of MOVE members, almost nothing was known about the cause and origin of the fire on May 13, 1985. The satchel charge was supposed to have been a non-incendiary device, yet it touched off a fire

destroying an entire city block. Because MOVE had claimed to have explosives and had threatened to burn down the block, there were serious questions as to the cause of the fire, including whether MOVE may have contributed to its magnitude. Finally, the intelligence available before the confrontation about MOVE's weapons and fortifications was minimal. Thus, answers to questions about everything from the number, identity and fate of the people in the house, to the number and kind of weapons possessed by MOVE and the extent of fortifications inside the house, might be found in processing the scene -- if the fire, which burned at temperatures exceeding 2,000° F, did not itself destroy all of the evidence.

We will first discuss the evidence retrieved from the scene and the factual conclusions which the evidence suggests. Next, we will discuss serious instances of incompetence which typified the retrieval process itself.

On the morning of May 14, 1985, personnel from the Mobile Crime Detection and the Homicide units of the Police Department, together with personnel from the Fire Marshal's Office, began to process the scene. At the Fire Marshal's request, personnel from the Federal Bureau of Alcohol, Tobacco and Firearms (ATF) also assisted on Osage Avenue. The Philadelphia Medical Examiner's Office did <u>not</u> assist at the scene that morning; although the Fire Marshal twice requested the presence of a Medical Examiner,

Chief Medical Examiner Marvin Aronson refused to come or to send an assistant until a body had been recovered.

Because the fire was yet smoldering on the morning of May 14, 1985 -- smoke was still rising from the debris and fire fighters were still directing hoses on the scene -- digging was delayed until the afternoon. In the interim, the Fire Marshal met with police and fire personnel to determine who would have responsibility for various tasks. Additionally, the Fire Marshal ordered that the entire scene be photographed, including the party (fire) walls, to determine whether MOVE had breached them, as was thought. Finally, before the actual search for bodies and evidence was begun, a crane was used to knock down the party walls, which were unstable and would have posed a risk to anyone digging inside the compound.

Digging began in the afternoon. The intense fire had reduced the Osage Avenue homes to nothing more than debris, smoldering in piles up to six feet deep within the party walls. A crane with a clamshell/bucket apparatus was used to scoop up material from inside the MOVE compound and deposit it onto Osage Avenue, where police and fire personnel would sift through it with rakes or shovels. After police and fire personnel had sifted through the objects dumped by the crane onto Osage Avenue, the material would then be taken by truck to two remote locations where it would be sifted again at a later date.

The foregoing process was pursued until about 4:00 p.m., when someone noticed a human leg dangling from the crane's scoop.

The crane operator duly dropped the leg back where it had been removed from, and police and fire personnel continued the search using shovels and rakes. About 4:20 p.m., a body was uncovered. (The Medical Examiner's Office later determined that these were actually the remains of two people.) At 5:00 p.m., then Assistant Medical Examiner Robert Catherman, M.D., arrived and helped with the search, both supervising the excavation and digging himself. By 7:30 p.m., when the search was suspended because of nightfall, six bodies had been recovered, all found in what had been the attached garage, all within inches of the floor.

The search resumed the following morning. The crane was used to move piles of bricks and heavy pieces of metal from the back of the house; the remainder of the search was again conducted with shovels and rakes. However, the crane was used in the front of the house to remove debris. Shortly before noon the crane dumped a bucket of material containing a body onto Osage Avenue. Digging was suspended until the arrival of Assistant Medical Examiner Robert Segal, M.D., at 12:30 p.m. Four more bodies were recovered that day. No other bodies were recovered at any later date, although some additional bones were recovered in the later-conducted remote-site sifting operation.

In total, eleven bodies (or, more accurately, human remains including eleven pelvises) were recovered from the debris. Some portions of some bodies and most portions of other bodies were completely consumed by the fire; nevertheless, all eleven were eventually identified. The Medical Examiner's Office identified

six of the bodies. Subsequently, Dr. Ali Hameli and two other forensic pathologists confirmed those identifications and additionally identified the remaining five bodies, either beyond a reasonable doubt or with a high probability of accuracy, using FBI fingerprint records, Army records, dental x-rays, birth records, x-rays of the children taken in the course of a child-abuse investigation, examinations of bone and teeth remains, blood-type determinations and information on who was thought to be in the house on May 13, 1985.

The bodies were identified as Vincent Leaphart (also known as John Africa or "Ball"), James Conrad Hampton, Frank James, Raymond Foster, Theresa Brooks, Rhonda Harris (Michael Ward's mother), Phil Africa, Tomaso ("Boo") Africa, Delicia Africa, Zanetta Dotson and Katricia Dotson ("Tree"). (Phil, Delicia, Zanetta and Katricia were juveniles ranging in age from approximately eleven to fourteen years old; Tomaso was thought to be seven to nine years old.) The Medical Examiner's Office and Hameli's team apparently disagreed only as to the identification of Katricia Dotson: In Segal's opinion, the remains identified by Hameli as belonging to Katricia, who was almost fifteen years old, actually belonged to a female who was at least eighteen or nineteen years old, and so could not have been Katricia.

All but two of the bodies were found heaped together in the garage, just inches from the concrete floor. Two bodies, those of Vincent Leaphart (John Africa) and Frank James Africa, were found at the front of the house and at a higher level than the

bodies in the garage. Leaphart was found in the porch area; James, although also found in the front, had a foot or more of debris under him than was under Leaphart, indicating that the two men may have been at different levels in the house when they died.

Although Hameli and Segal were in substantial agreement as to the identity of the bodies, they disagreed as to the causes of death. Segal initially concluded that all of the victims except Leaphart had died because of the fire, from smoke inhalation, carbon monoxide poisoning, and/or thermal burns. Segal acknowledged the necessarily limited evidentiary basis for some of his initial cause of death determinations. For example, he initially concluded that Body B-1 (a pelvis and partial thigh identified by Hameli as the remains of Katricia Dotson) had died from thermal burns and smoke inhalation. Segal made this cause of death determination "purely by proximity. She was found with all of the others together in the basement ... and it seemed reasonable to draw that conclusion. It certainly [could be] legitimately argued ... that I have overstepped to draw that conclusion...." More substantial remains existed for the other bodies, and the Medical Examiner's Office was able to perform more definitive testing on these remains. Segal explained that the cause of death determinations were based on the evidence he had, not speculation about evidence he did not have. Thus, given evidence (such as toxicology reports) that the people in the basement were alive during the fire and the absence of evidence that any of them died from anything other than the fire, it seemed reasonable to assume that

they died because of the fire. Nevertheless, he subsequently ruled that there was insufficient evidence to establish the cause of death for Zanetta and Katricia Dotson.

Segal ruled the cause of Leaphart's death unknown. No carbon monoxide was found in Leaphart's headless body. Because his head was never found (the evidence suggested that it may have exploded in the heat or burned completely), causes of death resulting from injuries to his head could not be ruled out. Moreover, because neither carbon monoxide nor soot was detected in Leaphart's body, Segal concluded that it was thus less reasonable -- although still not unjustifiable -- to think that he died because of the fire. A conclusion that he died prior to the fire would be consistent with testimony we heard from Angelucci. Angelucci told us that, after he and the other insertion team members had demolished portions of the party walls that morning, he observed what appeared to be a lifeless body in a crawl space area within the MOVE compound. Angelucci was unable to determine from his vantage point in 6217, however, whether the body's head had been severed and whether gunfire or the force of the explosions had caused death. Connor also told us that he thought "there appeared to be a body up there with an arm hanging down" but that, because the crawl space was dark and hazy, he could not be sure. (Although there also was no evidence of soot in the airways of Frank James (the other body found in the front of the house), Segal did not think he died from injuries sustained in the early morning explosions

because there was no evidence of this in James' essentially intact body.)

By contrast, Hameli concluded that no exact causes of death could be definitively stated for any of the eleven because, among other reasons, body samples were of poor quality, lab results were too imprecise and, in many instances, vital segments of the bodies had been completely consumed by the fire. Nevertheless, Hameli concluded that all eleven died as a result of injuries sustained during the events of May 13, 1985, whether from chemical injuries (such as carbon monoxide poisoning), thermal injuries (burns), physical injuries (such as debris falling on the victims) or injuries caused by metallic projectiles such as firearms ammunition.

While Segal acknowledged the difficulties and potential inaccuracies in determining the exact causes of death, he nonetheless explicitly rejected as a possible cause of death injury from firearms ammunition (i.e., gunshot wounds). One metal fragment consistent with double-ought ("double 0") buckshot or lead in a jacketed bullet was found in Delicia Africa's arm, three were found in Rhonda Harris' foot, and two were recovered from John Africa's torso. (A metallic object the size of a .50 caliber bullet was also recovered from Frank James' remains; however, it was later determined by the New York Police Department's Crime Lab and the FBI that the object was not a bullet but a piece of plumbing which had become embedded in his body by the force of an explosion.) Segal and Hameli both testified to the not-unexpected

presence of buttons, nails, screws and other foreign metallic objects and fragments in the bodies. Segal testified that although a few of the specimens recovered by Hameli were consistent with double-ought buckshot, the distribution of these fragments absolutely refuted any conclusions that anyone died from a gunshot wound on May 13, 1985. Segal explained:

> I have done a fair number of autopsies in my career and I've seen a fair number of people shot with double ought buck, and I have never, to the best of my recollection, ever seen anybody hit with only one buckshot and the rest miss. That doesn't happen. Buckshot is fired from a shotgun. There are nine balls coming out [of] the muzzle of that gun. If it's magnum loaded, it may be twelve or fifteen. They're coming out in a group ... and as they continue to fly, they spread out. And when you kill somebody with double ought buck, you find five, six, seven, eight, nine, ten, fifteen holes in them, and you recover that many ... double ought buck, from that individual.
>
> To say that one spray [sic] double ought buck hit a person and killed them is not likely. To say that it should happen three times in one scene is extraordinary. It's beyond my ability to conceive mathematically and statistically. There [was] plenty of double ought buck in that house, I'm sure, and as far as I am concerned, they were just another piece of debris that got into those bodies when the house collapsed....
>
> Even if you remotely want to say that maybe one of these double ought buck did get there by being fired at the person, there is no evidence that the double ought buck got through the muscle into any of the internal organs.... [T]here was enough of [the] bodies ... to identify the damage that would have occurred, and there was no evidence that these people received anything that resembled being shot to death. In my opinion, the double ought buck in these cases are of no more concern from the cause and manner of death

> standpoint than the nails and screws and dripping lead from the pipes and all the other metallic and non-metallic debris that was recovered from these bodies.

Segal similarly testified that although some buckshot might pass through a body, he had never seen someone shot with double-ought where some of the shot did not remain in the body.

Finally, Segal admitted that ruling out gunshot wounds as a cause of death was, of course, more problematic when certain body parts were missing. For example, because Raymond Foster's head was never recovered, Segal could not definitively state that Foster had not died of a gunshot wound to the head. Nonetheless, he observed that because three different labs found carbon monoxide in Foster's system, Foster was necessarily alive during the fire. Thus, if he were shot, it would have been during the fire, which Segal thought an unlikely scenario. Segal again emphasized that his determinations were made using the evidence he did have (e.g., that Foster was alive during the fire), not speculation about evidence he did not have. Segal did, however, rule out the possibility that Foster's head had been shot off. He testified that he had performed autopsies on people shot with almost every conceivable kind of weapon, and although some guns could badly mutilate a head, none would ever blow it off completely.

In addition to recovering the remains of eleven bodies, police, fire and other personnel at the scene also recovered weapons and ammunition belonging to MOVE. Despite MOVE's boasts that it had better weapons than in 1978, police recovered the remains of only

five weapons: A .38 caliber Charter Arms revolver and a twelve-gauge Mossberg pump-action shotgun were found in the front porch area, and a .22 caliber bolt-action rifle, a .38 caliber Smith and Wesson revolver and pieces of a Mossberg shotgun were found in the garage area. Additionally, many spent and unspent rounds were recovered, some from MOVE's weaponry and some from weapons fired by police. (Some bullet specimens also were found which could not have been fired by the police or by any of the weapons which were found inside the compound, including bullets for a Luger and for a .45 caliber gun.) From this evidence, firearms experts were able to determine that MOVE fired at least eighty-eight rounds (sixty-four from the .38 caliber revolvers, five from the .22 caliber rifles and nineteen from the shotguns). However, no definitive totals can be calculated, as other pieces of ammunition may have burned completely in the fire, or may have been overlooked (because of their small size) in the sifting operation.

As with the recovery of the bodies, the evidence of weapons recovered from the compound has raised unanswered questions. MOVE boasted of its arsenal and officers told us that the gunfire they received through the 6223/6221 party wall on the morning of May 13, 1985 was unquestionably from automatic weapons. Additionally, Tursi identified the weapon fired by the armed male in the alley as a semi-automatic .22 caliber rifle, not a bolt-action rifle. Finally, some of the bullet specimens found inside the compound could not have been fired by the few weapons found inside

the compound. However, no weapons other than the five noted above were found in the alley or in any of the houses from 6227 to 6213 Osage Avenue, none of the weapons recovered from the compound was capable of firing either in an automatic or semi-automatic mode, and none was ordinarily capable of firing through a brick party wall.

We have considered three possible explanations for these discrepancies. One explanation we considered was whether MOVE may have possessed other weapons (such as automatic and semi-automatic rifles, .45 caliber guns and Lugars) which disintegrated completely in the fire. Although Officer Edward Jachimowicz, a firearms identifications expert in the Philadelphia Police Department, told us that this was possible he did not think that automatic weapons would disintegrate completely. A second explanation is that the remains of other weapons were missed in the less-than-fastidious sifting operation undertaken, the details of which are discussed below. A final explanation accounting for the automatic fire received by the police in 6223 Osage Avenue is that they were actually being hit with "friendly fire" from police in Post One. Officer James Berghaier testified that, although he initially thought that his team was being fired upon by MOVE, he later thought that they may have been receiving police gunfire. Officer William Klein and Lieutenant Frank Powell, however, vehemently disagreed. Further, Klein explained that the trajectory of the bullets was consistent only with being fired from the MOVE house itself.

The remaining evidence uncovered at the scene was not particularly illuminating. A 55-gallon drum containing liquid (later identified as kerosene) was found in the garage, and several five- and one-gallon cans were found outside the perimeter of the house in the driveway. Additionally, police found papers and sandbags lining the basement walls and blankets covering some of the bodies. Finally, police, fire and Medical Examiner's Office personnel found a variety of animal remains (dog and chicken bones), pieces of the gun port and various other objects of little evidentiary value. No evidence was found of any tunnels and, indeed, Michael told us MOVE had not dug any.

A final matter of concern to us is the manner in which the scene was processed. The testimony we heard revealed a lack of coordination among various City agencies and a lack of care in searching for evidence. We will here discuss several specific instances of improper or questionable methods of evidence retrieval which occurred.

Numerous problems were occasioned by the absence of an established protocol for processing a large fire/crime scene such as this. Evidence retrieval was supervised initially by Fire Marshal Roger Ulshafer. Although the Medical Examiner's Office is responsible for investigating (among other cases) all homicides, suicides and suspicious deaths, Chief Medical Examiner Marvin Aronson refused two requests by the Fire Marshal to come to the scene or to send

an assistant. Hameli was critical of this decision. He told us that ordinarily in these cases the Medical Examiner's Office is in charge of investigating the scene and recovering the bodies, although other agencies will, of course, assist. Catherman told us that this was Aronson's normal approach to a "case of this kind," and was not critical of Aronson's initial decision not to go to the scene in the morning. However, Catherman did go to the scene later that afternoon, even though he knew that decision might be contrary to Aronson's wishes. Similarly, Segal, who was critical of Aronson's decision that no one should go to the scene, went to Osage Avenue on May 15, 1985, despite Aronson's initial disapproval.

Fire Marshal Ulshafer was also critical of the Medical Examiner's failure to come to the scene. He told us that although the Fire Marshal's Office usually processes fire scenes (sending any bodies to the Medical Examiner's Office), in unusual circumstances such as this the Medical Examiner would be in charge and absolutely should have come to the scene.

Because of the absence of a specific protocol for processing scenes such as this, the evidence retrieval was not well-coordinated among the various offices, and appropriate care was not taken. Catherman found many people walking around the scene when he arrived, but told us that this did not upset him because he regarded it as a fire scene, not a crime scene. Additionally, he found that some body parts already had been placed in Fire Department body bags when he arrived, so he was not able to direct their

excavation. Finally, he testified that, had he regarded it as a crime scene rather than a fire scene, he would have been more careful to note where evidence was found. Having heard this testimony, we recommend that City officials establish procedures and protocols to be followed for evidence retrieval and analysis at major crime scenes where there is multi-agency involvement.

Numerous other instances of less than careful processing of the scene became apparent from the testimony we heard, despite the Fire Marshal's initial organizational efforts at the scene (such as assigning tasks to personnel from various agencies, requesting additional personnel from City and federal offices and ordering numerous photographs to be taken). To insure the safety of those digging inside the compound, the unstable party walls were removed before any digging was undertaken. However, removal of the walls was accomplished by knocking them down with a crane. Most of the bricks fell into the compound, further burying (and perhaps damaging) critical evidence. The crane was then used to scoop debris -- including bodies and other evidence -- from within the compound and dump it onto Osage Avenue, where police and fire personnel raked through it. As a result of this procedure, some of the bodies were damaged, and the exact locations from which these bodies (and at least one of the weapons) were unearthed could not be determined. Hameli was critical of this method of evidence retrieval:

> Q. Based on your experience as a Medical Examiner, is the use of a clam shell at the scene appropriate use of equipment?

> A. No, the answer to that question is definitely no. One has to keep in mind that it was a very difficult scene of course to investigate.... [T]he entire building actually collapsed. Everything from the top went down to the basement floor where actually the remains ultimately were found. The proper way [to investigate these] cases is to do layer by layer ... removal of the debris.... [A]s you arrive at the point where the remains are found there should be stakeouts and numbers ... and pictures [should] be taken and notes be written.... [T]hen the whole thing [should] be moved. But unfortunately, the maximum care was not given in this particular case.... [U]sing the clam shell, for instance, [caused] some post-mortem ... limb fractures and some mingling of some segments of the bodies which made ... the identification difficult for the Medical Examiner's Office and also ultimately [made it] difficult for our team to conduct our work.

In contrast to this orderly method of evidence retrieval outlined by Hameli, an almost careless method of retrieval was pursued at the scene. Although numerous pictures were taken, many of the bodies were first photographed after they had been placed on litters instead of when they were first uncovered. Similarly, many of the photographs were taken after the objects had been scooped up by the crane and dumped onto Osage Avenue. This was so even though some of the objects were visible to personnel at the scene before the crane scooped up the objects. In those cases, personnel would simply tell Crime Lab officers where the debris had come from, and the officers would make a note of the information. However, many of the pictures themselves were not labelled until two months after the incident. Moreover, the evidence itself was sometimes removed from the compound in lots -- for example, a shovel-full of bones -- and then

was labelled as a lot; individual pieces were not separated or labelled. (Catherman said that the bodies could not be separated at the scene.) Additionally, three entirely separate labelling systems were employed by the Police Department, the Fire Department and the Medical Examiner's Office in recovering the bodies: the Medical Examiner labelled the bodies A through K, with some sub-numbering, and the Mobile Crime Unit numbered the bodies, with some sub-lettering. (Thus, for example, Katricia Dotson was identified by the Police Department as Body 2A, by the Medical Examiner as Body B-1, and by the Fire Department as Body 11. This discrepancy in labelling was not discovered until two-and-one-half days after the processing had begun.) The lack of specification in labelling was repeated in the tagging of scoops of debris removed from Osage Avenue. After police had raked through the debris, it was sent for further remote-site sifting, labelled only with an indication of whether or not it had come from 6221 Osage Avenue; no further specification was made of where inside the compound the material had come from.

Two final matters of concern to us are whether the bodies, once removed from the scene, were expeditiously and properly examined. Hameli told us that the bodies were not kept in constant refrigeration and, in fact, were kept unrefrigerated for seven or eight days awaiting examination, so that by the time his team received the bodies, they were in very poor condition. His team subsequently moved them to a separate refrigeration facility. Both Catherman and Segal objected to this criticism. Segal told

us that, to the best of his knowledge, there was no problem with the refrigeration while his office was examining the bodies. He pointed out that the refrigeration problems only arose when Hameli had the bodies moved to another refrigeration facility which had not been used for several years. The bodies were put in that facility before it had been activated long enough to have brought the temperature as far down as it ought to have been. This refrigerator was then locked and Segal's team had no further access to it. Catherman repeated this explanation, but added that the facility was at an improperly high temperature for only twenty-four hours, which was not enough to make a difference. The bodies were simply in bad shape from the beginning.

Lastly, Hameli said that the Medical Examiner's Office did not submit toxicology specimens for analysis in sufficient time to yield accurate results. Segal, however, disagreed. He explained that the delay was reasonable because other aspects of the autopsy took priority, and that the delay did not make any difference (although he recognized that some people may disagree with that).

Unfortunately, it is impossible to gauge accurately the effect of these numerous instances of careless or unprofessional processing of the evidence. Had the scene been processed in a more meticulous manner, perhaps -- and only perhaps -- there would have been complete agreement among the pathologists that causes of death had been definitively determined, and perhaps additional weapons or other probative evidence would have been recovered.

We are satisfied, however, that the evidence was not so mishandled as to preclude accurate answers to the truly critical questions, such as whether MOVE members or children were killed by police gunfire in the area.

XII. THE C-4 COVER-UP AND RELATED ISSUES

Two very significant facts regarding the Police Department's use and possession of C-4 came to light before this Grand Jury investigation was convened: (1) Early in 1985, FBI Special Agent Michael Macys delivered more than thirty-seven pounds of C-4 to the Department's Bomb Disposal Unit (previously only relatively small amounts of C-4 were under the unit's control). (2) C-4 was included by Klein in the explosive device/satchel charge which was dropped by helicopter in the late afternoon of May 13, 1985. Our subsequent investigation disclosed two other matters of importance pertaining to the Department's possession and use of C-4: (1) Explosive charges containing C-4 were twice used by Insertion Team B during the morning assault on 6221 Osage Avenue. In each instance a 1-1/4 pound block was employed. These charges were employed by the team (which first entered 6217 and then broke through to 6219), while attempting to remove the porch wall between 6219 and 6221 and to remove the porch fortifications from which they were taking extensive gunfire. (2) A much lesser amount of C-4 -- either one third of a (1-1/4 pound) block or one-third of a pound -- was used by Insertion Team A when it subsequently attempted to breach the living room wall between 6221 and 6223.

Essential facts regarding the Department's use of C-4 on May 13th -- both in the morning assault and in the early evening satchel charge -- are included in earlier parts of this report. Our purpose here is to explain how C-4 came into the Department's

possession and what actions some police officers took to preclude public disclosures about their possession and use of C-4. These latter activities also required us to consider whether criminal charges should be brought against any of the officers involved in the cover-up.

We first considered how the Police Department came to possess a high-power military explosive such as C-4. Previously, C-4 was more readily accessible to police departments than it is today. At least since 1984, however, this explosive has been available only to and through the military. Nevertheless, various small amounts of C-4 came, almost routinely, into the Bomb Disposal Unit's possession. The typical route was as follows: Explosive and bomb training were available to Bomb Squad members through the federal government. Classes were held on various occasions at the FAA facility in Pomona, New Jersey, usually under the instruction of FBI Special Agent and explosives expert Michael Macys. We learned from Macys and others that it was an acceptable practice, at the completion of these classes, to give any surplus explosives -- including military explosives such as C-4 -- to individuals from the different participating law enforcement agencies for those agencies' legitimate use. It was by that method that small amounts of C-4 came to be in the Bomb Squad's possession in late 1984 and early 1985. The legitimacy of that possession, which was made possible by the FBI, was never an issue until after May 13, 1985.

In order to augment the C-4 available to the Bomb Disposal Unit, in January of 1985 Macys delivered to the Squad thirty 1-1/4 pound blocks of C-4 -- 37-1/2 pounds of this high-power explosive. The C-4 was obtained by him from the FBI at Quantico, Virginia; it was given by Macys to the unit, not by request, but because Macys had been unable to provide any leftover C-4 at the completion of the 1984 school. He made the delivery in January because he believed that, without such material for training uses, the benefits of the Pomona instruction would be lost or very substantially diminished. The provision of such material, while "not quite common practice," was certainly not secret. When this delivery was made, at least Powell, Angelucci and Muldowney were aware of it; Klein may also have known of the C-4's arrival, and, in our view, probably did.

The January delivery of more than thirty-seven pounds of a high-powered explosive was revealed by the MOVE Commission and occupied much attention when publicly brought to light. The Commission, as we are, was greatly concerned about such a sizable delivery being made without restriction. Like us, the Commission was also concerned that the Bomb Disposal Unit was somewhat unprofessional and insufficiently trained or experienced in handling explosives. This is partly evidenced by the misunderstanding on the part of some Squad members about C-4's risks and characteristics. Klein, for example, did not view C-4 as an "incendiary device," and believed that C-4 was safer than Tovex. Based on these assumptions, he mixed C-4 and Tovex when preparing the

satchel charge. Explosives Expert Phelan, however, indicated that C-4 creates risks not present with Tovex. C-4, for example, detonates at 24,500 feet per second, while Tovex detonates at 17,000 feet per second. There is also a higher propensity for fire because one characteristic of C-4, not present with Tovex, is that it creates heat upon detonation. We also learned from Phelan and Angelucci that the mixing together of Tovex and C-4 results in tremendous force, heat and destruction upon detonation; indeed, when so mixed with C-4, Tovex can assume C-4's characteristics and explode at a higher rate.

The explosives at the scene were transported either by individual officers or in the Bomb Squad truck. Klein, a member of Insertion Team A, testified that he placed about two pounds of C-4 in the pack which he took to the scene and into 6223 Osage Avenue. According to him, this explosive was not taken from the box containing Macys' large C-4 delivery. Rather, he took it from a much lesser amount of C-4 that had previously been obtained for K-9 (canine) training. This K-9 C-4 was not in its original wrapping. Rather, it was in pieces and had, among other things, been bitten by the dogs. Klein also said that none of this C-4 was used inside 6223 and that the approximately two pounds of C-4 taken from the K-9 supply was the full extent of the C-4 which he brought to the scene. We do not credit Klein's testimony on these latter points. Graham's immunized testimony, which we do credit, contradicted these statements by Klein. According to Graham, C-4 provided by Klein, at Graham's request, was included by them in

the device used to breach the 6223/6221 living room wall. Further, because that C-4 was in its original block form and in its original wrapping (not "dirty and moldy" but "still good" bits and pieces as described by Klein), it was almost certainly C-4 from the Macys delivery. Given Klein's other free admissions to us about his possession of C-4 and its use by him in the satchel charge, we do not understand why he chose to lie about his source of C-4 or its use inside 6223. It plainly appears to us, however, that he did.

The explosives available for use by Insertion Team B were brought to the scene and carried by Muldowney. Muldowney told us that he brought at least two blocks of C-4, and said he wanted C-4 available for use by the team in the event that they encountered a "bad situation." Like Klein, he said that he did not take this C-4 from the box in the explosives magazine where the Macys C-4 was stored. Rather, he said that he took the entire contents of a smaller bag of C-4, stored in the magazine, which had been obtained before January of 1985. There is no evidence before us indicating otherwise. It was that C-4 which was used at Connor's direction inside 6217 on the morning of May 13th.

Other explosives were brought to the scene in the Bomb Squad truck early in the morning by Officer Blackman. Blackman also returned to the Police Academy mid-day at Powell's direction to obtain more explosives. Nothing which we heard about the delivery of these explosives, however, suggested that any additional C-4 was stored in the truck or otherwise available at the scene.

The facts with respect to Insertion Team B's actual use of C-4 inside 6217 at Connor's direction, and Insertion Team A's use of a lesser amount of C-4 in the device constructed by Graham and Klein, are set forth in Part VI of this report. In summary, the first such charge used by Connor's team contained a 1-1/4 pound block of C-4. A like amount was used in the second such charge although -- dissatisfied with the results of the first attempt -- Connor had requested something "a little heavier." It was this second device which exposed the very substantial bunker fortifications on 6221's front porch.

The fact that C-4 was employed by Insertion Team B while inside 6217 did not subsequently become widely known. According to Muldowney, the question of disclosure was discussed by and with Connor even before the team left the premises. Muldowney said that he acquiesced in an agreement not to discuss C-4's use because of "peer pressure" and a desire to keep Mike Macys "out of it." As a result, C-4's use inside 6217 was not divulged to anyone, outside a Bomb Disposal Unit/Police Department "inner circle," until we were so advised by Muldowney and Angelucci. The use of C-4 inside 6217, which Muldowney and Angelucci first told us about, was thereafter confirmed by Powell. He testified that, within a few days of the confrontation, Connor admitted to him that C-4 had been used inside 6217. Powell, however, maintained his silence about this use until shortly before testifying before us when he spoke with attorneys and investigators involved in this Grand Jury investigation.

Officer Raymond Graham also maintained his silence for a protracted period of time about his and Klein's use of a much smaller amount (either 1/3 of a pound or 1/3 of a 1-1/4 pound block) of C-4 when they constructed the device intended to breach the 6221/6223 living room party wall. Klein disavowed such use of C-4. Graham, however, whose testimony was available to us only after the grant of limited use immunity, admitted for the first time in his appearance before us to their use of C-4. He also said that he did not tell Powell about C-4's inclusion in the device and that he was not subsequently told by Klein to deny C-4's use.

Facts with regard to the use of C-4 in the satchel charge were also slow (but somewhat less slow) in surfacing. Klein told us that about 1-1/4 pounds of C-4 from his pack were included in the device because he believed that this would most effectively remove (push off) the bunker. He twice said that he did not recall if Powell asked or was told on the scene what was included in the charge. It was his view that he "probably" did so advise Powell, but he said that he could not specifically remember. Powell maintained that he did not find out about the C-4's inclusion while at the scene and that he did not open the satchel. He said that the possible inclusion of C-4 was first suggested to him by Graham a "couple" of weeks later. The basis of Graham's hypothesis was the "crack" that the device made when detonated. After this suggestion by Graham, Powell ostensibly told Klein that he "didn't want to know" what was in the device.

We have been unable to resolve to our satisfaction the question of whether Powell knew, before its delivery, that the satchel charge device contained anything other than two long tubes of Tovex. We are satisfied, however, that, following the confrontation, Powell and Connor, together with other police officers, set upon a course of action to altogether avoid the disclosure of facts about the Department's use and possession of C-4 on May 13, 1985 and afterwards.

As already noted, non-disclosure of information about C-4's use inside 6217 was discussed even before leaving that house. Other similar discussions followed. Powell said that there was a conversation on the night of the incident at Bomb Squad headquarters at which he cautioned against discussing the C-4 because Macys would get "jammed up" since Macys had provided a substantial amount of C-4 to the Squad. Angelucci and Muldowney recalled a conversation with Connor two or three days after the confrontation, during which Connor (1) raised concern about disclosing C-4's use, (2) said that disclosure would implicate Macys, and (3) suggested uniformly saying that a substance like Tovex had been used. Angelucci recalls that Connor also suggested that disclosure should be avoided because of a possible violation of federal law.

According to their testimony, Muldowney and Angelucci acquiesced to the non-disclosure plan. Angelucci said he did so faced with Connor's insistence and "knowing about the normal retaliation within the Police Department ..." Angelucci also recalled another conversation on the issue of disclosure at which Powell and Connor

were present. It then appeared to Angelucci that Powell was "taking his responses from Sgt. Connor in reference to what we should say we used ..." It was also Angelucci's view that Powell was more concerned about Macys than was Connor.

In addition to the putative desire to protect Macys, there was testimony presented to us suggesting at least one other reason why the police officers declined to be forthright with respect to the matter of C-4. This arose from Sambor's public statement, not long after the confrontation, that the device which was delivered to the roof by helicopter, contained only Tovex. Klein told us that, upon learning this, he felt "there was no way I was going to criticize the Police Commissioner. They would just crucify me if I changed the story." He also said that he was told by Connor "Don't make any waves. A bomb is a bomb no matter what was in it. Just keep you mouth shut."

The result of these various conversations was that C-4's use in the device was not immediately disclosed by anyone. Further, the various members of Insertion Team B agreed to say that HDP boosters (which were closer in velocity to C-4 than Tovex) were used by them in their morning assault on 6221. Statements consistent with these agreements were given to homicide detectives and MOVE Commission investigators. When questioned by homicide, Connor specifically said that he never had or used C-4. In addition, while at a press interview, Powell -- well knowing that the Bomb Disposal Unit then possessed a substantial amount of C-4 -- stated that they had no C-4.

The C-4 deception went beyond false and misleading statements and extended to a physical cover-up. In large part, the Bomb Disposal Unit's abysmal, if not non-existent, record-keeping with regard to both the Squad's possession of and Squad members' access to explosives made this possible. (We learned that the Unit's record-keeping procedures with respect to these matters have since very drastically improved.)

According to Powell, it was the MOVE Commission's formulation which prompted hiding the C-4 still possessed by the Unit. At one point, consideration was given to the C-4's destruction; Powell said, however, that he decided it was too expensive to destroy. Instead, the C-4 was removed from the Bomb Squad magazine and first hidden on the hill at the Range. Next, it was placed in the rafters of the bomb shack; upon reflection, however, Powell concluded that this arrangement was too dangerous. He then placed the C-4 in a box in the Squad's locker. This was a storage area which was also accessible to the federal authorities. Powell took advantage of this and marked "FBI" on the box. When MOVE Commission investigators thereafter appeared and asked what the box contained, Powell responded that they would have to contact the FBI if they wanted to inspect the box. As they did not do so, the Squad's cache of C-4 was not then seen by the Commission investigators or identified as belonging to the Police Department.

In August, 1985, the truth about the C-4 began to come out as a result of an internal Police Department investigation.

Under Department auspices, tests were conducted to determine how the rooftop explosion occurred. Initially, one-pound tubes of Tovex were used to attempt to recreate the explosion on the roof. Testing shifted from one-pound Tovex tubes to two 2.27 pound tubes of Tovex, however, after Powell told Captain Eugene Dooley that he thought that two such tubes had been used in the device. Testing with even this greater amount of Tovex, however, still did not ignite the flammable liquid which they placed nearby. (At that time the police did not sufficiently know the cause of the explosion so as to be able to duplicate the rooftop conditions.) Further, comparison of the Channel 10 tapes of the actual explosion and tapes of the test explosions using Tovex evidenced a very different sort of detonation.

As a consequence of the differences in the tapes and the inconclusive testing results, Dooley told Sambor that he did not believe that they had been accurately advised about the bomb's composition. Based thereon, it was decided to reinterview Klein and Powell. After being faced with the tapes and other evidence, Klein admitted, at his interview, that he had included a block of C-4 in the device in addition to the Tovex tubes. According to Dooley, Klein said that he felt that he was the only one experienced enough to decide what was needed to bring about the desired results. Klein, on the other hand, said that he told Dooley that the C-4's use was authorized by Brooks and/or Sambor. (See earlier discussion in Part VII of this report.) Both Dooley and Klein agreed, however, that Klein then said that the only C-4

included by him in the device was the C-4 which he personally brought to the scene in the event of an emergency.

The Klein admission was thereafter discussed by Dooley with Sambor. It was Dooley's belief that Sambor sent a memo to the Managing Director regarding this. The only related irregularity of which Dooley was aware, according to his testimony, was that he was instructed to keep everyone uninformed about the tests conducted at the Academy.

Although Klein's admission with respect to C-4's use was leaked to the media not long afterwards, a substantial period of time passed before all of the facts with respect to Macys' January 1985 C-4 delivery came to light. Macys told us that his concern about whether C-4 had been used in the device caused him about one month afterwards to ask Powell what happened to the C-4. He was then assured by Powell that he need not worry because "it" was "long gone." Macys then decided not to ask any more questions. His concerns did not abate, however, particularly when he later learned of MOVE Commission inquiries about police possession of C-4.

It was against this background that Macys met Officer Rementer of the Bomb Disposal Unit in Center City in September, 1985. Coincidentally, Powell was giving a statement at homicide headquarters at the same time. Rementer's version of the conversation was that Macys was upset, said that he had to talk to Powell, and said that it could not be disclosed that they got C-4 from him. Macys said that Rementer asked him if it was okay that "that stuff

is still up there," and he responded "You've got to be kidding me." (According to Macys, this was after it had been publicly reported that the police had denied having more than a pound of C-4.) Macys said that Rementer then made a call, and, upon returning, told Macys not to worry because the stuff was "long gone." Macys said he did not believe this, but did not press. Rementer's version was that he called Connor and told him that Macys said that disclosure could not be made. According to Rementer, Connor responded to this by instructing Rementer to tell Macys that it had been "taken care of."

Despite the Bomb Disposal Unit's assurances to him, it was Macys himself who eventually disclosed the facts regarding his very sizable delivery of C-4. Macys was interviewed about C-4 by MOVE investigators in the beginning of October, 1985. Some of the Commission's inquiries made Macys uncomfortable. In addition, certain of Macys' responses raised such doubts in the investigators' minds that they discussed these doubts with another FBI employee. The doubts were thereafter relayed to Macys by the employee. As a result, Macys concluded that he was bound to disclose fully the facts with respect to the C-4 delivery. An FBI agent, who also acted as a legal advisor, told Powell of Macys' intent. Thereafter, on the Tuesday after Columbus Day, 1985, Macys provided all the details about the delivery to his supervisor. These were communicated to MOVE Commission Chairman Brown by the FBI in a letter dated October 22, 1985. That letter was

publicly read into the Commission's record by Brown on October 25, 1985.

Connor also testified before the MOVE Commission on October 25, 1985. The FBI's letter concerning Macys' C-4 delivery was read into the record at the conclusion of Connor's direct examination and before his questioning by the Commissioners. When asked about his knowledge of the delivery, Connor maintained that it was only "the other day" that he had learned about it. In addition, during his direct examination, he denied having either C-4 or Tovex while inside 6217 and, thus, of necessity, inferentially denied using C-4 while in 6217. He also said during his direct testimony that only about 3/4 of a pound of C-4 was then in the Unit's possession at the Range, and that he was unaware of any other C-4 in the Unit's possession.

Although granted limited use immunity (i.e., legally guaranteed that his testimony could not in any way be used against him), Connor persisted in telling lies when he first appeared before us. On that occasion, he told us, among other things, (1) that he did not recall what explosives were brought into 6217, but that a list was given to the MOVE Commission at its request; (2) that he did not make sure he had C-4 because, as far as he knew, "there was not that much plastic available to use"; (3) that he did not remember if he had C-4 in 6217; (4) that he did not remember if he asked Powell whether C-4 could be obtained; (5) that he did not "believe" that he asked anyone inside 6217 whether they had C-4 to use as a counter-charge; and (6) that three HDP boosters

were used in the first attempt to remove the wall of 6221 and that more than three such boosters were used in the second attempt. Additionally, Connor said that he thought that his September, 1985, conversation with Rementer referred to lesser amounts of C-4 which had earlier been delivered by Macys (as opposed to the large January, 1985 delivery). He also told us that their "concern was that a friend of ours might get jammed up for doing something that might be perceived as improper" and that "[a]n explosive is an explosive, whether you buy it from a civilian warehouse or you get it off the military."

Later, Connor returned voluntarily, without immunity or a subpoena, and admitted that much of the above testimony was a lie. Specifically, he (1) admitted to C-4's possession and use, at his direction and with his knowledge, while inside 6217; (2) said that he collectively decided with Powell, Angelucci and Muldowney not to mention plastic explosives; (3) explained his prior lack of candor was the result of an effort to protect brother officers and the FBI agent, as well as his belief that "it was somewhat immaterial whether it was plastic or HDP boosters"; (4) told us that he knew that a substantial quantity of C-4 (he recalled sixteen or seventeen pounds rather than thirty-eight pounds) was stored not in the magazine, but out in the shed, well before a week before his Commission testimony; and (5) acknowledged his awareness of the attempts to hide the C-4 from the MOVE Commission. He also very profusely apologized to us for his prior

falsehoods. This latter version of events was corroborated by the testimony of Angelucci, Muldowney and Powell.

We have very extensively considered whether we should recommend the lodging of criminal charges against these police officers as a result of any of the previously described actions intended to prevent the disclosure of facts about the possession and use of C-4. It is our considered judgment that no such charges should be brought. The reasons for this conclusion are set forth in detail below. We wish to make it clear at the outset, however, that our decision does not reflect approval of the actions of (1) the various officers who misled Police Department and MOVE Commission investigators, (2) Klein, who although candid about his possession of C-4 and its use in the satchel charge, apparently lied about his source for that C-4 and about its use inside 6223, or (3) Connor, who, by his own admission, lied under oath to both the MOVE Commission and this Grand Jury. Rather, it reflects our consensus, based on a variety of legal, practical and moral considerations, that ending this massive investigation by charging a few front line officers would not serve any purpose or vindicate any interest when it was the City's high elected and appointed officials who were at least morally responsible for this great tragedy.

Having said that, we will nevertheless briefly outline some of the criminal charges which might arguably be brought against some individuals. (In so doing, we stress the word arguably.

With respect to many charges and officers whose names have been mentioned, there would or might exist substantial legal or factual questions in connection with any prosecution. We shall briefly allude to some, but not all, of these problems.) These charges include perjury, false swearing, tampering with or fabricating physical evidence, obstructing administration of law or other governmental functions, and criminal conspiracy.

A person commits perjury if, in any official proceeding, he makes a false statement under oath, or affirms the truth of a statement previously made, if the statement is material and the person who made it does not believe it to be true. A statement is material if it could have affected the course or the outcome of the proceeding in which it was made. Whether factual falsification is material in a given situation is a question of law. Further, a person cannot be found guilty of perjury if he retracted his false statement in the course of the proceeding in which it was made before it became apparent that the falsification was or would be exposed and before the falsification substantially affected the proceeding. Nor can the falsity of a statement be established, and a person be convicted, based only on the uncorroborated testimony of a single witness.

False swearing in official matters occurs, essentially, when a person makes a false statement under oath, or swears to a prior statement's truth, when he does not believe the statement to be true, and when he makes the statement in an official proceeding or he intends the statement to mislead a public servant in

performing his official function. The provisions of the perjury statute with respect to, among other things, retraction and corroboration also apply to this charge.

Tampering with or fabricating physical evidence occurs if a person, believing that an official proceeding or investigation is pending or about to be instituted, takes action with respect to any record, document or thing to impair its verity or availability, or makes, presents or uses any record, document or thing knowing it to be false, with the intent to mislead the investigator or like public servant.

It is to be noted that the term official proceeding or investigation is pertinent to each of the previously discussed offenses. Our Grand Jury investigation is clearly such an official proceeding. Whether the MOVE Commission is also an "official proceeding" for purposes of these statutes is a question which we have not tried to answer since we have decided, for other reasons, that charges should not be brought. However, as the MOVE Commission's formulation was novel in Pennsylvania, the issue of its status is almost certainly a matter which would have been vigorously litigated by those charged if indictments were returned.

There are two remaining statutes which must also be mentioned which do not involve "official" proceedings. The first, obstructing the administration of law or other governmental function occurs when a person intentionally obstructs, impairs or perverts the administration of law or other governmental function by physical interference or obstacle or any other unlawful act. Conspiracy

occurs if people agree to engage in conduct which constitutes a crime and they entered into that agreement with the intent of promoting or facilitating the commission of that crime. For a conspiracy to exist, there must also be some overt act, by one of the conspirators, in furtherance of a conspiracy after it is formed.

In evaluating whether any of these charges should be lodged by us, we first generally categorized the actions pertinent to the C-4 taken by the various officers. They fell in three categories: (1) deception of investigators for the Police Department and MOVE Commission; (2) deception of the MOVE Commission itself; and (3) attempts to deceive this County Investigating Grand Jury.

The first category of actions is not the proper subject of a criminal prosecution. While there is no doubt that homicide detectives and/or Commission investigators were misled by Connor, Powell, Klein, Muldowney and Angelucci, legal practicalities and other considerations militate against the lodging of charges. For example, the "pre-format interview" method first employed by homicide neither encouraged nor lent itself to full disclosure by those interviewed. The authority of the Commission investigators is also unclear. Furthermore, the statements obtained then may have been coerced by City officials. Statements given under these tainted circumstances are simply not significant enough to serve as the predicate for a criminal indictment.

Most importantly, however, we feel that this misconduct was but a footnote to the tragedy that left eleven people dead. Given the enormity of the loss, the infantile deception engaged in by

these officers after May 13th is a petty detail. Their asinine behavior did not prevent this Grand Jury from determining the truth about the source and use of C-4. Although there is no excuse for hiding and altering evidence, that matter was collateral to the central issue of our investigation. It would be a mockery of justice to punish these officers, who risked their lives in confronting MOVE, while their superiors, the parties morally responsible for the entire debacle, went unscathed.

To the best of our knowledge, only two officers -- Connor, by his own admission, regarding his use of C-4, and Klein, regarding the limited matters in which he is contradicted by Graham -- persisted in the second and third categories of conduct: the dissemination under oath of falsehoods and half-truths to the MOVE Commission and to this investigating body. (Muldowney, Angelucci, Klein and Powell did not testify before the MOVE Commission; with the exception of Klein's evidence regarding the source of C-4 and its use inside 6223, we believe that the testimony which they gave before us with respect to the C-4 was candid and truthful.) The question of whether to recommend that they be charged with perjury and related offenses as a result of this conduct has been agonizing.

Nevertheless, we have decided not to bring perjury and other charges against them. Particularly given Connor's audacity in lying to us, it is tempting to do otherwise in his case. (Klein's refusal to fully detail his conduct is far less audacious and, indeed, somewhat puzzling to us.) However, in light of our belief

that a few policemen should not be the exclusive target of legal process, we will not move only against these officers. In so concluding, we note that Klein has altogether retired from law enforcement with a psychiatric disability and that Connor, although he remains in law enforcement, is no longer in the City's employ. Hence, a determination as to whether Connor's lies reflect adversely on his ability to perform law enforcement duties is a decision that need not be made by the Philadelphia Police Department.

XIII. CONCLUSION

Our report attempts to recount this City's greatest tragedy from beginning to end. It is an epic of governmental incompetence. It details an operation marked by political cowardice in its inception, inexperience in its planning, and ineptitude in its execution. Even the ensuing investigations were marred by deception.

While the conduct of City officials in handling MOVE is entirely unacceptable, it is not the proper subject of criminal prosecutions. Applying the law to the facts as we found them, no charges are warranted. Yet we do not exonerate the men responsible for this disaster. Rather than a vindication of those officials, this report should stand as a permanent record of their morally reprehensible behavior. This City, its leaders and citizens, must never forget the terrible cost of their misjudgments.